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A. *Acme Fast Freight* and *Substituted Freight Service* were decided by men who wrote Part II and who were charged with initiating its administration 41

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF WESTERN AND SOUTHEASTERN RAILROADS

OPINIONS BELOW

The opinion of the District Court (R. 17) is reported in 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.

STATUTES AND RULES INVOLVED

Interstate Commerce Commission Rules 500.1-500.3, 49 C.F.R. 500.1-500.3, are printed in Appendix A hereto, page 92, and in 322 I.C.C. at 413, R. 795.

The National Transportation Policy, 49 U.S.C. preceding § 1, and §§ 1(4), 2, 3(1), 15(3), 202(c), 203(a)(12)(13)(14)(15)(16), 206(a)(1), 208(a)(b), 209(a)(1), 216(c), 216(d), 302(d)(e), and 309(a)(f) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 2, 3(1), 15(3), 302(c), 303(a)(12)(13)(14)(15)(16), 306(a)(1), 308(a)(b), 309(a)(1), 316(c), 316(d), 902(d)(e), 909(a)(f), are printed in Appendix B.

QUESTIONS PRESENTED

In addition to the questions set forth by appellants, these appeals raise these further questions:

(1) Whether the action of the Interstate Commerce Commission may be sustained on the basis of findings of fact and conclusions of law not relied upon in the Commission's report.

(2) Since neither Rules 2 and 3, nor any other rules embracing the use of rail open tariffs by motor and water carriers, were included in the proposed rules presented to the parties at the outset of the proceeding, can the findings and conclusions establishing Rules 2 and 3 be sustained?

APPELLANTS' BRIEFS

One brief has been filed by the United States and the Interstate Commerce Commission and will be referred to as the Government brief. One brief has been filed by American Trucking Associations, Inc., and certain motor carriers, and by the National Automobile Transporters Association, and will be referred to as the ATA brief. While the Commission's TOFC Rules apply to both motor and water carriers, the issues of law here presented are substantially the same as to each mode. Therefore we follow the Government and ATA in discussing the issues in terms of motor carrier use of rail open TOFC tariffs.

STATEMENT OF THE CASE

The Government's statement (Br. pp. 3-18) and ATA's statement (Br. pp. 3-11) omit facts that are necessary for consideration of the case, and contain inaccuracies and argumentative material.

It is unnecessary to duplicate here the history of TOFC services and these proceedings as developed in their statements by the Eastern Railroads and Southern Railway, nor to cover every unsupported statement of fact of the appellants as reviewed by Southern. Our statement will supply certain important facts omitted from appellants' statements and correct other allegations.

1. A Comparison of the Traffic and Revenues of the Motor Carriers and the Railroads

Appellants' statements (and the rest of their briefs) assume as a fact that the railroads' TOFC practices are putting the motor carriers at an economic disadvantage with the railroads. For example the Government says (p. 4): "The competitive balance between the railroad and the truck has been altered by the development and growing utilization of the piggyback technique (322 I.C.C. at 307-308, 322) . . . ." The record shows that the competitive balance continues to favor the motor carrier industry and that the growth of TOFC services has not succeeded in reversing the motor carrier industry's continuing improvement in its relative proportion of the nation's traffic.

The following table (R. 316) is self-explanatory. When the table was prepared the figures for 1959 were the latest available. Figures for the later years are from the cited official sources. The table at R. 316 was reproduced as Appendix III to the Examiners' Recommended Report (R. 766) and is the subject of comment by them (R. 610).

We suggest comparison of the figures before and after 1954, since appellants say that that year marked the commencement of the intensive growth and development of TOFC service (Govt. p. 7, ATA p. 14).

TON MILES AND FREIGHT, EXPRESS AND MAIL REVENUE OF RAILROADS AND CLASS I, II AND III MOTOR CARRIERS—YEARS 1939 THROUGH 1964

	Ton Miles			Freight, Express and Mail Revenue		
Year (1)	Railroads (Billions) (2)	Class I, II & III Motor Carriers (Billions) (3)	Percentage Motor Carriers of Railroads (4)	Railroads (Millions) (5)	Class I, II & III Motor Carriers (Millions) (6)	Percentage Motor Carriers of Railroads (7)
1939	338.850	19.646	5.80	$3,473.1	$ 792.2	22.81
1940	379.201	20.683	5.45	3,765.3	867.0	23.03
1941	481.756	26.835	5.57	4,703.4	1,095.7	23.30
1942	645.422	28.083	4.35	6,268.7	1,212.7	19.35
1943	734.829	28.768	3.91	7,156.3	1,304.7	18.23
1944	746.912	27.253	3.65	7,400.2	1,351.9	18.27
1945	690.809	27.289	3.95	6,927.0	1,406.3	20.30
1946	602.069	30.448	5.06	6,120.2	1,654.5	27.03
1947	664.523	37.693	5.67	7,464.3	2,213.6	29.66
1948	647.267	46.706	7.22	8,445.2	2,698.1	31.95
1949	534.694	47.891	8.96	7,487.4	2,911.2	38.88
1950	596.940	65.648	11.00	8,427.6	3,737.1	44.34
1951	655.353	72.292	11.03	9,211.8	4,169.2	45.26
1952	623.373	70.843	11.36	9,409.4	4,417.5	46.95
1953	614.199	76.510	12.46	9,563.5	4,926.4	51.51
1954	556.557	72.301	12.99	8,373.3	4,737.1	56.57
1955	631.385	82.906	13.13	9,110.5	5,535.2	60.76
1956	655.891	83.015	12.66	9,527.8	5,828.9	61.18
1957	626.222	84.408	13.48	9,483.9	6,165.9	65.01
1958	558.738	84.339	15.09	8,630.1	6,131.2	71.04
1959	582.497	101.377	17.40	8,900.9	7,144.9	80.27
1960	579.130	104.355	18.02	8,594.1	7,213.9	83.94
1961	566.997	104.595	18.45	8,294.4	7,462.7	89.97
1962	599.977	111.877	18.65	8,550.6	8,131.1	95.09
1963	629.337	120.566	19.16	8,698.0	8,548.3	98.28
1964	666.207	N/A	N/A	8,992.4	9,154.8	101.81

N/A = Not Available

SOURCE:

Years 1939-1959:—R. 316

Years 1960-1964:—Col. (2)—Annual Reports of Interstate Commerce Commission to Congress.
Col. (3)—"Transport Economics," May 1966, Bureau of Economics, I.C.C.
Col. (4)—Columns (3) ÷ (2).
Col. (5)—"Statistics of Railways in the United States," published annually by I. C. C.
Col. (6)—"Transport Economics," October 1966.
Col. (7)—Columns (6) ÷ (5).

We call attention to a few features of the table. The freight, express, and mail revenues of the railroads have shown but little growth between 1954 and 1964 (the last year for which statistics are available), while the same revenues of the regulated motor carriers have almost doubled. In 1954 the motor carriers' revenues were 56.57 per cent of the railroads' revenues, while in 1964 the corresponding ratio had risen to 101.81 per cent. In 1954 ton miles handled by Class I, II and III motor carriers were 12.99 per cent of the ton miles handled by the railroads. In 1963, the last year for which these data are available, such motor carriers had increased this relationship to 19.16 per cent. Thus in the period of the most rapid growth of TOFC service, regulated motor carriers improved their relative competitive standing in relation to the railroads from both a volume and revenue standpoint. In 1963, the last complete year of the table, the regulated motor carriers' revenues were 98.28 per cent of the railroads', but the motor carriers' ton-miles were only 19.16 per cent of the railroads' ton-miles. "These figures show clearly that motor carriers have been able to attract generally the higher rated commodities, while the railroads have hauled a much greater ton-mile volume than the motor carriers but at much lower rates per ton-mile." (T. H. Maguire, commenting on similar percentage relationships for the years before 1960, R. 303.)

The Director, Department of Research and Transport Economics, ATA, after noting that tons and ton-miles handled by the trucking industry have continued to increase during the period that piggyback service has been growing, and while railroad traffic has changed only modestly, concluded that railroads were not recapturing large volumes of traffic from the highways with piggyback service. (Transport Topics, January 24, 1966, p. 4.) There is evidence "that

freight forwarder piggyback shipments consist in large measure of former rail traffic, which had moved in boxcars." (Piggyback Traffic Characteristics, 1966, p. 22.)

TOFC service offered one opportunity to the railroads to change a competitive trend that was very obviously adverse to them, particularly in respect to the handling of the relatively higher rated manufacturing and miscellaneous category of traffic. Even with the benefits of TOFC service the railroads have not been able to reverse the adverse trend in the relative proportions of traffic handled by railroads and motor carriers.

2. There is No Shipper Support of Record for Rules 2 and 3

Note should be taken of the fact that the Government goes directly to a discussion of the competitive balance between the motor carrier industry and the railroads. There is no claim that Rules 2 and 3 have been issued responsive to any demand of record by shippers for such regulations. No record references are cited to shipper testimony and indeed the Commission's discussion of the open-tariff question does not cite shipper support as a justification for the rules. (322 I.C.C. at 327-337.)

3. "The Root of the Problem"

After sketching the growth of trailer-on-flatcar (TOFC) service, the government concludes that "[P]iggyback service did not follow in the 1950's the course of mutually beneficial rail-motor cooperation that these beginnings presaged." (Br. p. 10) Below we deal with this conclusion factually. Here we go to the Government's next sentence:

> "The root of the problem was the suggestion by the Commission in 1939 in *Substituted Freight Service*, 232 I.C.C. 683, that a motor carrier could not act as both a common carrier by motor vehicle and as a shipper by rail."

The root of the problem lies in the provisions of Part II which the Commission properly construed in *Substituted Freight Service,* 232 I.C.C. 683. The Commission did not inadvertently reach its conclusion in that case. It referred to *certificate* provisions of the Act, stated that the issue before them was one of law, i.e., squaring the substitute services with the *certificate* and tariff provisions of the Act, put a question as to whether such services could *only* be performed in accordance with Section 216(c), and held that they had to comply with that Section, citing in the course of their analysis cases dealing with certificate and authority issues. (See Part II—A, *infra.*) Congress, with full knowledge of the holding in *Substituted Freight Service* and similar holdings has failed to change that holding to permit motor carriers to be shippers and has refused to amend Section 216(c). (See Part III-C, *infra.*)

4. Motor Carrier Participation in TOFC Service

At page 12, the Government states:

> "Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads."

This follows a paragraph in which the only discussion relates to the fact that some railroads have declined to enter Plan I arrangements with motor carriers. In the study by the Commission's Bureau of Economics, quoted at pages 5-6 of the Government's brief, it is noted that:

> "While the 1962 and 1964 percentages may not be fully comparable, it is known that there has been a considerable amount of 'in and out' piggyback activity by motor carriers." (Piggyback Traffic Characteristics (1966) p. 19.)

Thus one factor affecting the growth of joint, coordinated service has been the election of motor carriers not to make use of arrangements that were available to them. Motor carrier participation in TOFC service is also limited by Teamster labor agreements. (R. 358-359, 749; 322 I.C.C. at 381-383.)

Furthermore, the study goes on to say that:

> "For one quarter of 1964, a high ratio of empty to loaded units were reported by five carriers, one showing 3,440 empty to 143 loaded units. These returns, combined with the data reported in a presentation by A. C. Flott before the Highway Research Board, [27] tend to confirm information that some motor carriers were making use of piggyback primarily for empty return movement." (p. 20.)[1]

There is no traffic or economic study of record to indicate who actually performed the highway portion of TOFC services under the various Plans nor that the present flexibility of service does not better meet the needs of shippers than a system regulated so as to force the expansion of joint-coordinated service of regulated long-haul motor carriers and railroads in preference to local and short haul carriers and railroads. Local and short haul motor carriers perform the highway portion of movements in connection with all five of the basic types of TOFC service. (R. 786-787.) They are also able to handle the highway portion of Plan II½ services, a more recent development in which the railroad provides the trailer or container but the shipper makes his own arrangement for the highway movement to

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1. Footnote reference in original text refers to Footnote 25 on page 19 "A presentation by A. C. Flott, Director — Department of Research and Transport Economics, American Trucking Association, Inc., entitled 'Effect of Piggyback Operation on Volume of Highway Truck Traffic, Highway Research Board, January 1966 . . . .'" See also pages 41-42.

and from the ramps. (Piggyback Traffic Characteristics (1966) p. 9.) The data on page 12 as to number of trailers handled under each Plan bear only on the volume of joint coordinated service, but do not demonstrate that the railroad provided the entire movement.[2] With reference to the status of TOFC statistics, the Bureau of Economics has said:

> "Until the present time, available statistical data on TOFC operations and services have not been sufficiently detailed or comprehensive to give an adequate account of piggyback.
>
> • • •
>
> The Commission understood that it would be in a much better position to assess the importance of piggyback and of the various plans if data were available as to total piggyback traffic and revenues, and for each of the several plans." (Piggyback Traffic Characteristics (1966) pp. 4, 5.)

The Commission acted in Ex Parte 230 without the benefit of statistical data just now becoming available.

5. The Trucking Industry's Position

The long-haul portion of the trucking industry took a position in support of proposed Rules C-1 and C-3 as distributed at the prehearing conference. These rules would have abolished Plans III and IV. (R. 703, 704.) Counsel for the American Trucking Associations, Inc. said in oral argu-

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2. The comparison of data from Railway Age and Transport Economics in Footnote 9 on Page 12 of the Government's brief is improper. The Railway Age data covers only 24 railroads whereas the Transport Economics data covers 69 railroads, a different base. The conclusions drawn from the March 1966 Transport Economics are invalid. The data pertain to only three quarters of 1965, not the full year. The number of highway trailers transported by railroad were shown in total including all Plans, not just those moving on Plans II, II½, III and IV. See Piggyback Traffic Characteristics (1966) p. 45.

ment: "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that the motor carrier cannot use an open tariff." (322 I.C.C. at 388.) A spokesman for A.T.A. told a Senate Committee that "We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers." (See page 49, *infra*.)

6. All TOFC Service Is Not Bimodal

The Government (Br. p. 15) and ATA (Br. p. 10) repeat the statement of the Commission (322 I.C.C. 329) that "[A]ll TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation. . . ." (Emphasis is in text.) That expression is repeated throughout the appellants' briefs.

This conclusion is both factually and legally erroneous. For example, TOFC service can be performed from industry location to industry location with shipper and receiver loading and unloading the trailer and with no movement over the public highways. Such service may be desired to avoid damage in transit that may be encountered in other types of rail equipment.

Congress, by virtue of the terminal area exemption of § 202(c), 49 U.S.C. 302(c), has treated pick-up and delivery service within the terminal areas as incidental to railroad service. Congress has not considered that such operations so relate to the inherent advantages of Part II motor carriers as to require evaluation of the potential competitive impact in applications for operating authority nor are separate charges required to be established for the terminal services and their competitive impact upon Part II motor carriers assessed. The National Transportation Policy calls for ". . . regulation of all modes of transportation subject

to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . ." The modes are to be dealt with in accordance with the provisions of the Act and those provisions do not make all TOFC service bimodal.

7. The Proposed Rules of October 9, 1962, Did Not Include TOFC Rules 2 and 3 Nor Any Other Open-Tariff Rule

The Commission's order instituting the proceeding under review, Ex Parte No. 230, dated June 29, 1962 (27 F. R. 6434), stated in part:

> "Specific issues to be considered and determined in this proceeding, among others, are:
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> • • •
>
> "II. The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations. If so permitted, under what conditions and limitations." (R. 56.)

The order invited interested parties to submit representations to the Commission on or before September 4, 1962, and assigned the matter for a prehearing conference on October 9, 1962. (R. 57-58.)

At the prehearing conference on October 9, 1962, the Commission distributed "Proposed TOFC Rules." These appear in Appendix II to the Commission's report, 322 I.C.C. at 406-410, and in the Record, pp. 141-148. These Proposed Rules did not include issue II, set forth above, that was in the Commission's notice of June 29, 1962 instituting the proceeding. The Proposed Rules did not include any issue or rule that in any way involved the question whether motor and water carriers could lawfully use railroad Plans II, III and IV open tariffs for the transportation of freight ten-

dered to them by shippers. The Proposed Rules were thereafter published in 27 Federal Register 10174, along with special rules of procedure for their submission (R. 152).

The direct contradiction between issue II of the June 29, 1962, notice, and the proposed Rules of October 9, 1962, is affirmatively shown by proposed rule C-1. Rule C-1 (322 I.C.C. at 408; R. 145) *would have abolished TOFC Plans III and IV*. (R. 183; see the Examiners' proposed report, R. 703, 704.) The Examiners rejected this proposal as unreasonable and not in the public interest (R. 713). As a result, one of the main issues considered by the parties was the possible effects of abolition of Plans III and IV. (R. 198-9, 204, 210, 219, 231, 258-60, 265, 270-8, 280, 284-6, 297-9, 306, 345-6, 369-71, 440, 443-8, 451-9, 462, 466-9, 471-3, 493, 496, 501-2, 507-8, 512, 519, 528, 533-4, 553, 558, 581-2, 586-90, 593.)

Along with these Proposed Rules the Commission distributed an explanatory statement describing them. After relating that the Commission had received information from the respondents through representations and answers to questionnaires, this document continued: "Based on all available information, a draft of proposed rules has been prepared. . . ." (R. 129.) One of the presiding Commissioners at the prehearing conference made it plain that the proposed rules distributed there defined the issues insofar as the Commission was concerned (R. 151).

These were the Proposed Rules upon which the parties submitted all of their evidence (R. 183-597), upon which the Examiners' proposed report was based (R. 605-790), and which were before the parties when they filed their exceptions to the proposed report of the Examiners and their replies to exceptions. During all of these extensive proceedings the issue whether motor and water carriers could utilize rail open tariffs was not before the parties, and no evidence directed to it was submitted. Since it was not

embraced in the Proposed Rules, the parties took no interest in it.

The Examiners' report was served August 23, 1963 (R. 605). It dealt with the questions embraced in the Proposed Rules of October 9, 1962. The open-tariff issue was, of course, not considered by the Examiners since it was not before them.

On November 8, 1963, the Commission notified the parties that an oral argument would be held on December 10, 1963, on a number of issues including:

> "Whether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)." (R. 792.)

That was the first time that issue had appeared since it had been abandoned by the Commission in formulating the Proposed Rules of October 9, 1962. The first mention of Section 2 of the Act occurred in the Commission's Report.

Thus, in the most critical period of the proceedings before the Commission, the presentation of evidence and arguments to the Examiners, the railroads had no notice that the open-tariff issue was going to become involved in the proceeding. Instead, by reason of its omission from the October 9, 1962, rules, the presumption existed that it was not.

SUMMARY OF ARGUMENT

I

A motor carrier may perform the service which it is authorized to conduct under Part II of the Interstate Commerce Act only by operating motor vehicles upon the public

highways. It may not perform its authorized service by shipping its trailers under a railroad open tariff. These related principles are established by the plain meaning of the relevant provisions of Part II, and this plain meaning is confirmed by an unbroken line of Commission and court cases construing these statutes, except for the case at bar. Not only do the statutes specify that authorized motor carrier service must be performed upon the public highways, but in addition they in terms exclude the use of a vehicle or car operated exclusively on rails.

These same principles apply to water carriers. Under the plain terms of Part III of the Act water carriers must perform their authorized service in vessels upon waterways, and not by shipping their traffic by other carriers, and the Commission has so held.

Apparently conceding that a motor carrier must perform some of its authorized service upon the public highways in order to maintain its status as a motor carrier under the Act, appellants claim that a motor carrier may perform a "portion" of its "authorized service" by shipping its trailers by rail under a rail open tariff. This claim is without merit. A motor carrier may accept traffic from a shipper for carriage only as authorized by Part II of the Act. Under this authority the service of a motor carrier must be performed exclusively upon the public highways.

Since a motor carrier, under these provisions, may not perform its authorized service by using open-tariff TOFC service, it may not tender traffic it is handling as a carrier to a railroad, and therefore questions relating to discrimination under §§ 1(4), 2 and 3(1) of the Interstate Commerce Act are not reached.

II

Relying on the certificate or authority provisions of Part II of the Act and the voluntary through route and joint rate

provisions of Section 216(c), as well as the tariff publishing requirements, the Commission held in *Substituted Freight Service,* 232 I.C.C. 683 (1939) that coordinated motor-rail services could only be established under the voluntary procedures of Section 216(c). Stated differently, the Commission held that it was repugnant to the Act for a carrier to act as both a carrier and shipper as to the same traffic. For 25 years the Commission adhered to that construction of the Act, repeating the statutory foundation for the decision in later cases.

III

The construction of the Act described in Parts I and II above was adopted by Commissioner Joseph B. Eastman, who wrote Part II of the Act, and by other Commissioners who with Commissioner Eastman guided Part II through Congress and initiated its administration. Their construction is entitled to great weight, and it has been followed without a break by the courts, and by the Commission until the case at bar.

Repeated proposals have been made to amend Section 216(c) to give the Commission authority to order through routes and joint rates into effect between motor and rail carriers but none has been approved by Congress. More recently, proposals have been made to amend Section 2 to apply new rules to coordination of Rail TOFC services with other modes. The President of the United States and many executive departments all agreed the legislation was needed to change present voluntary arrangements. No one advised Congress that the legislation was unnecessary, including the Commission. The Commission is not now at liberty to change the settled construction of the law pertaining to voluntary coordination of motor-rail services.

IV

Rules 2 and 3 would result in the compulsory establishment of through routes in violation of Section 216(c). Those rules authorize through carriage over a motor-rail-motor route without intervention of the shipper at the transfer points under arrangements that are fixed at the time the traffic is first tendered by the shipper to the motor carrier. Joint rates are not required to establish a through route. The through route would be established as a result of the compulsory effect of the promulgation of Rules 2 and 3, the authorized holding out of rail service by a motor carrier under those rules being substituted for the voluntary concurrence provided for in Section 216(c).

V

Section 2 is inapplicable for reasons beyond those set out above. It relates to discrimination in the terms of compensation paid by shippers. Section 3(1) relates to discrimination in services but is inapplicable because of the proviso. The plain meaning, the legislative history and the case law all make it plain that section 3(1) does not apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description. Motor and water carriers would be tendering their traffic to railroads under Rules 2 and 3. Accordingly, section 3(1) does not apply to that traffic.

VI

The specific provisions of the Act do not require railroads to accept traffic under their open tariffs from other carriers acting as carriers. The general policies relating to the prohibition against discrimination among shippers do not provide a legal substitute upon which to base Rules 2 and 3, nor does the National Transportation

Policy. The Commission's authority to interpret the Act does not permit the issuance of Rules that contradict specific provisions of the Act.

VII

The proposed rules that were before the parties during all of the evidence-taking stage of this proceeding did not include TOFC Rules 2 and 3. The proposed rules did not include any issue or rule directed to the question of whether motor and water carriers could or should lawfully use TOFC Plans II, III, and IV open tariffs for the transportation of freight tendered to them by shippers. As a consequence the record made before the Commission did not include evidence directed to the issues raised by Rules 2 and 3. Because of the revolutionary nature of these Rules it must be presumed that, given notice, the shippers, motor and water carriers, freight forwarders, and railroads would have presented evidence with respect to these rules and the underlying principle. Because the notice was inadequate, adequate evidence to support Rules 2 and 3 was not presented and findings thereon could not be made. The effect of this lack of notice is the same as if substantial evidence had been wrongfully excluded. As a result of inadequate notice, Rules 2 and 3 are not supported by adequate evidence nor findings of fact based on such evidence.

VIII

A motor or water carrier remains at all times a carrier and must operate in accordance with its authorized service. If a carrier tries to assume the additional mantle of a shipper under Rules 2 and 3, it becomes a violator of § 410(c) of the Act, 49 U. S. C. § 1010(c), regulating freight forwarders, as pointed out in the separate brief of the freight forwarders.

ARGUMENT

I

RULE 3 IS UNLAWFUL BECAUSE IT EMPOWERS FOR-HIRE INTERSTATE MOTOR CARRIERS TO PERFORM THEIR "AUTHORIZED" MOTOR CARRIER SERVICE BY SHIPPING THEIR FREIGHT-LADEN MOTOR VEHICLES BY RAILROAD. THE INTERSTATE COMMERCE ACT SPECIFICALLY REQUIRES THAT A MOTOR CARRIER MAY PERFORM ITS AUTHORIZED SERVICE ONLY BY OPERATING MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS.

Rule 3(a) grants to *motor common* and *contract carriers* the right to "utilize TOFC service in the performance of all or any portion of their *authorized service* through the use of open-tariff TOFC rates published by a rail carrier." (Emphasis supplied.) Other parts of Rule 3 implement paragraph (a). Rule 3 is unlawful because the Interstate Commerce Act requires that the motor carrier's "authorized service" be performed only by operating motor vehicles upon the public highways. It may not be performed by shipping the motor vehicles by rail. This principle is established by the plain language of the Act and by the decisions of the Commission and the courts, including this Court, construing the Act.

It seems clear that it is now appellants' position that a motor carrier must perform a substantial part of its "authorized service" by motor vehicle upon the public highways in order to maintain its status under the Act as a motor carrier (Govt. p. 53, 58; ATA p. 37). After this concession the Government goes on to say (p. 53):

> "The Act nowhere states, however, that a motor carrier who also offers to perform (unless otherwise directed by the shipper) a portion of his authorized service by rail piggyback rather than over the highway exceeds his authority."

Similarly, ATA says (p. 37), referring to authorities cited on this question by the District Court:

> "Clearly, these cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another."

Appellants thus recognize that the Interstate Commerce Act defines the authorized service of a motor carrier as transportation performed *by motor vehicles upon the public highways.* But their contention that a motor carrier may at times perform its service authorized under the Act by shipping its trailers by rail is erroneous.

Our argument will first discuss the relevant sections of the Act and the decisions construing them. Then we will deal with appellants' arguments by showing that the motor carrier service authorized by the Act must be performed exclusively by operating motor vehicles upon the public highways.

A. The plain language of the Interstate Commerce Act confines the performance of a motor carrier's "authorized service" to the operation of motor vehicles upon the public highways, and does not permit performance of that service by shipping motor vehicles by railroad.

Motor common and contract carriers are defined by the Interstate Commerce Act as persons who operate *motor vehicles upon the public highways* in the transportation of property for compensation. These definitions and the terms of the regulatory provisions of the Act show clearly that a motor carrier may perform its authorized service only by operating motor vehicles upon the public highways.

The District Court so held, saying in part (R. 30-31):

> "The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority conferred on the carrier. Each mode of transportation is

the subject of a separate formal part of the Act: part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle,' not by rail or other modes, and on the 'public highway'[13]"

"13. Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1); 49 U.S.C. §§ 303(a)(1) and (c), 306(a)(1), 309 (a)(1)."

Section 203(a) of the Interstate Commerce Act, 49 U.S.C. § 303(a), provides in part:

"(12) The term 'highway' means the roads, highways, streets, and ways in any State.

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property . . . but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails. . . .

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property . . . for compensation, whether over regular or irregular routes. . . .

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate

> or foreign commerce, for compensation (other than transportation referred to in paragraph (14). . . ."

Section 206(a)(1), 49 U.S.C. § 306(a)(1), provides that with exceptions not here material—

> "[N]o common carrier by motor vehicle . . . shall engage in any interstate or foreign operation *on any public highway*, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission *authorizing* such operations. . . ." (Emphasis supplied.)

Similarly, § 209(a)(1), 49 U.S.C. § 309(a)(1), provides that—

> "[N]o person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce *on any public highway* or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, *authorizing such person to engage in such business*. . . ." (Emphasis supplied.)

The foregoing provisions of the Act, and § 208 hereafter cited, 49 U.S.C. § 308, were part of the original "Part II" of the Act, the "Motor Carrier Act, 1935." 49 Stat. 543. Their language has remained the same in all particulars relevant to the issues in the case at bar. Decisions construing these provisions in their early years apply with equal force to the present Act.

B. Construing the above cited provisions of the Interstate Commerce Act, the Commission held for twenty-seven years, and until the case at bar, that a motor carrier must perform its authorized service by operating motor vehicles upon the public highways, and that a motor carrier could not perform its authorized service by shipping, by rail, freight it had accepted from shippers for carriage. The courts, including this Court, have uniformly sustained that holding.

Referring to decisions described in the foregoing heading, the District Court, agreeing with them, held (R. 38-39):

> "In the courts, a similar principle is established in holdings to the effect that a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C. N.Y. 1940), aff'd p. c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. The *relevant premise* of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad." (Emphasis supplied.)

Appellants present patently erroneous analyses of this holding and of *Acme Fast Freight,* 30 F. Supp. 968, which was cited as authority by the District Court (Govt. p. 56; ATA pp. 36-37). To show how wide of the mark are appellants' claims, we will first explain *Acme* and the decisions that have followed its holding and then we will return to appellants' contentions.

As indicated in the District Court's holding, some of the decisions upon which we rely involved issues arising under the "grandfather" clause of § 206(a)(1) of the Act, 49 U. S. C. § 306(a)(1).[3] Those decisions are directly applicable here.

To obtain a "grandfather" certificate or permit an applicant had to prove that during the "grandfather" period it was engaged in operation as a motor common or contract carrier. *Thompson* v. *United States*, 321 U. S. 19, 23 (1944):

> "Under the 'grandfather' clause of § 206(a) of Part II of the Interstate Commerce Act, a certificate of public convenience and necessity can be awarded only to one who is a 'common carrier by motor vehicle' within the meaning of the Act."

The Commission and the Courts uniformly held that an applicant who, during the "grandfather" period, shipped by rail open tariff, freight tendered to it as a carrier, was not engaged in operating as a "common carrier by motor vehicle" or as a "contract carrier by motor vehicle," since it was not performing its service by operating motor vehicles upon the public highways. Therefore, they held, it was not entitled to a "grandfather" certificate or permit.

In our case the question is precisely the same as in the "grandfather" cases, whether the service of a common or contract carrier by motor vehicle may be performed by shipping its loaded motor vehicles by rail under an open tariff, and the answer, similarly, must be in the negative.

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3. [I]f any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation . . . "

In 1937, two years after the enactment of Part II of the Act, 49 Stat. 543, the Commission, Division 5, held that a motor carrier must perform its authorized service by operating a motor vehicle upon the public highways, and that it could not perform such service by shipping by rail, as a shipper, the freight held by it as a carrier. *Acme Fast Freight, Inc., Common Carrier Application,* 2 M. C. C. 415. The entire Commission, in a report by Commissioner Eastman, affirmed. 8 M. C. C. 211 (1938.) This holding was sustained in *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (S. D. N. Y. 1940), and this Court affirmed, 309 U. S. 638.

The *Acme* principle was followed by other Commission and court decisions, and was never departed from until the Commission established Rules 2 and 3 in 1964. On four occasions, the last in 1965, this Court affirmed without opinion the judgments of district courts that followed the *Acme* rule. No court ever has held contrary to the *Acme* rule.

In *Acme* the facts were these. Acme sought a certificate of public convenience and necessity as a motor common carrier under the "grandfather" clause of § 206(a)(1), 49 U.S.C. § 306(a)(1). (See note 3, *supra.*) During the "grandfather" period Acme performed some transportation services by motor vehicle upon the highways. But for the most part during that time it shipped, by railroad, water, and motor carriers, freight it had accepted from shippers for carriage. Its rail shipments moved on rail bills of lading at regular rail tariff rates, (an arrangement that would be authorized by TOFC Rule 3).

The Commission held that in shipping freight by other carriers Acme was not performing the service of a motor common carrier as defined in Part II, and was therefore not entitled to "grandfather" rights as to that service.

The Commission, Division 5, said in part (2 M. C. C. at 424-425):

> "The kind of a carrier which the act was designed to regulate is indicated by the opening words of section 206(a) [49 U.S.C. § 309(a)], as follows:
>
> "'No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway,* or within any reservation subject to the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. (Emphasis supplied.)'"
>
> [Note: Emphasis and words "emphasis supplied" are in original text.]

Because of the importance of this question reargument before the entire Commission was granted. 8 M.C.C. 211 (1938). Commissioner Eastman wrote the report for the Commission, saying in part:

> *"A principal issue here is whether applicant is a 'common carrier by motor vehicle,' as defined in the act, and if so, to what extent.* In considering this issue, applicant's operations as a carrier may for convenience be divided into those which are direct and those which are indirect. The direct operations are those in which the carriage is performed by vehicles under the immediate ownership or control of applicant and without utilization of the services of any other carrier, and *are confined to motor-vehicle operations.* The indirect operations, which are much more extensive, are those in which the services of other carriers, *by rail,* by water, or by motor vehicle, are utilized.
>
> "Division 5 found that applicant is a common carrier by motor vehicle only with respect to its direct operations, and not with respect to its indirect operations.

As to the latter, applicant sought a certificate covering indirect operations in connection with rail, express, and water carriers, as well as motor carriers. The prior report considered at length applicant's argument in support of such a certificate, and reached the conclusion that 'applicant is not a common carrier by motor vehicle as to all of its operations, but only as to its motor-vehicle operations in interstate or foreign commerce,' page 426. We regard the discussion and conclusion of division 5 with respect to this matter as adequate and sound." (8 M.C.C. at 215.)

• • •

"[V]arious provisions of the act are significant. Section 206(a) provides, as shown above, that no motor common carrier 'shall engage in any interstate or foreign operation on any public highway' without a certificate. *Can it be said that a forwarding company is engaged in 'operation' on a highway merely because goods in its custody are transported on that highway by an independent motor carrier?*" (8 M.C.C. at 219-220.) (Emphasis supplied.)

1. Appellants' Erroneous Analyses of Acme

As we stated above, appellants have presented erroneous analyses of *Acme*. The Government says (p. 56):

"The court below cited *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 . . . for the proposition that the *Substituted Freight Service* dictum had received a judicial imprimatur. But that decision held only that a motor common carrier could not establish *joint rates* with a freight forwarding company, since Section 216(c) of the Act . . . requires that both parties be regulated common carriers, and forwarders were, at the time, unregulated. The opinion recognizes that forwarders could and did avail themselves of *open tariffs*, and does not intimate that a regulated carrier could not." (Emphasis is in text.)

To show how wrong that statement is calls for a little more analysis of *Acme* than would otherwise be required. The Court said in *Acme* (30 F. Supp. at 971):

> "We hold that the Commission was right both (1) in refusing to issue a certificate of public convenience and necessity to the forwarders and (2) in striking from its files the joint tariffs filed by Acme Fast Freight Inc."

The Government overlooked holding number (1) and the conclusions of law underlying it. These are determinative of the issues under discussion in the case at bar.

Immediately following its description of its two holdings, the District Court in *Acme* went on (p. 971) to explain its holding number (1):

> "The business of forwarders is to collect small shipments of goods, consolidate them and then reship them in bulk. In their business they employ rail and water carriers and also trucks. In their railroad operations, which are the larger part of their business, their profit is derived from the spread between the carload rates under which they ship and the less-than-carload rates which the owner would have to pay."

The Court held on these facts, as the Commission had, that a person thus shipping goods under a rail open tariff, precisely as would be authorized by TOFC Rule 3, was not engaged in transportation of property by motor vehicle upon the highways, and therefore was not operating as a common carrier by motor vehicle. The Court said in part (p. 972):

> "The Commission declined to grant a certificate of convenience and necessity to the four forwarders on the ground that they were not engaged as common carriers by motor vehicle within the purview of the Motor Carrier Act. This seems justified by Sec. 203(a)(14)

> . . . which defines a common carrier by motor vehicle as any person 'who . . . undertakes . . . to transport property . . . by motor vehicle for compensation, whether over regular or irregular routes. . . .'"

The Government states (p. 56) that the *Acme* opinion "does not intimate that a regulated [motor] carrier could not" use rail open tariffs. While that precise factual question was not presented in *Acme*, the Court held that shipping its traffic by rail under an open tariff is not the service that a motor carrier is authorized to perform by the plain terms of the Act. That holding is irreconcilable with the view that a motor carrier may use rail open tariffs in the performance of its "authorized service." A regulated motor carrier may accept goods for carriage and issue a bill of lading therefor only under the authority of and the terms imposed by the Act. It has no other rights as a motor carrier when it accepts traffic for transportation. "[A] common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations . . ." by assuming authority to perform service under alleged non-statutory rights. *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 764 (1931).

ATA's erroneous analysis of *Acme* and related cases is summarized by the statement (p. 37): "[T]hese cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another." We show the error in that and a similar objection of the Government (p. 53) in our Part I-D below.

2. Decisions Following the Acme Principle—Motor and Water Carrier Cases

Denials by the Commission of applications for "grandfather" motor carrier authority, based on the *Acme Fast Freight* principle, were also sustained in *Kline* v. *United*

States, 41 F. Supp. 577 (Nebr. 1941); *Moore* v. *United States,* 41 F. Supp. 786 (Minn. 1941), aff'd 316 U. S. 642; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N. D. Ill. 1941), aff'd 314 U. S. 580; and in *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (Nebr. 1965), aff'd 382 U. S. 67.

Numerous other applications for "grandfather" motor carrier authority have been denied by the Commission, either in whole or in part, on the basis of the *Acme* principle. See the list of these in Appendix C hereto.

In 1942 the Commission cited *Acme,* in applying the *Acme* principle to water carriers, in *Strickroot Common Carrier Application,* 250 I. C. C. 211, 216. The Commission quoted § 902 of Title 49, which defines a common carrier by water as one who engages in transportation by water, and held that water carrier service must be performed in water borne vessels upon waterways.

C. In 1965 the United States and the Commission successfully urged the District Court and this Court to follow the Acme Fast Freight principle in Andrews Van Lines, Inc. v. United States, 240 F. Supp. 763 (Neb. 1965), aff'd 382 U. S. 67.

In *Mollerup Van Lines Alaska Grandfather Application,* 95 M. C. C. 338, the Commission on December 18, 1963, denied a number of applications for "grandfather" motor common carrier certificates between the 48 contiguous states and Alaska on the ground that, during the "grandfather" period, the applicants had not been performing a transportation service between Alaska and the other states by motor vehicle. Instead, applicants had been linking their highway operations in the 48 states to Alaska by water, rail, or air transportation between Seattle, Washington, and Alaska

points. The Commission adopted the Examiner's report, which stated its principal conclusion as follows:

> "One thing is abundantly clear: this Commission is not here concerned with movements other than those performed by applicants as *common carriers by motor vehicle*. The Commission is without authority to grant certificates under the provisions of section 206(a) of the act except in respect of operation by motor vehicle. Transportation by water, rail, or air is not transportation by motor vehicle and cannot form the basis for a grant of authority for motor vehicle operations under the 'grandfather' provisions of the act." (95 M. C. C. at 342.) (Emphasis is in text.)

The Commission's order was upheld in *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (Nebr. 1965), aff'd 382 U. S. 67. The District Court said in part:

> "The Interstate Commerce Commission does not have the power to grant a certificate under the 'grandfather' provision to allow the continuance of operations other than that of motor vehicle." (p. 767.)

This Court granted the motion to affirm filed by the United States and the Commission. The principal argument in the motion proceeded as follows (p. 4):

> "The statute requires that, in order to qualify for grandfather authority, the transportation that the carrier performed on the critical date must have been entirely by motor vehicle, and cannot have been a combination of motor vehicle and ship, plane or rail carriage. Section 206(a)(4) provides that 'any common carrier by motor vehicle * * * [which] was engaged in the transportation of * * * property as a common carrier by motor vehicle between places in the United States and places in Alaska' on August 26, 1958, is entitled to grandfather rights. Section 203(a)(14) of the Act, 49 U. S. C. 303(a)(14), defines 'common carrier by motor vehicle' as 'any person which holds itself out * * * to

> engage in * * * transportation by motor vehicle,' and Section 203(a)(13), 49 U. S. C. 303(a)(13), defines a motor vehicle as '* * * any vehicle, machine, tractor, trailer, or semitrailer * * * used upon the highways.' Plainly the statute did not intend to treat carriage by ship, plane or train as carriage by motor vehicle."

The reasoning set forth in the *Andrews Van Lines* decisions and motion to affirm is precisely the same as that appearing in the *Acme* opinions and in other cases cited above, including the three other district court decisions that were affirmed by this Court, and in the opinion of the District Court in the case at bar (R. 31, 38-39). In each case the basic issue was, as stated by Commissioner Eastman in *Acme* (8 M. C. C. at 215), "whether [the person involved] is a 'common carrier by motor vehicle' as defined in the Act." In each case it was held that a person is not a "common carrier by motor vehicle as defined in the Act" when he is shipping by rail (or by another carrier) freight that he has accepted from a shipper for carriage. He is not performing his "authorized service" under the Act (Rule 3(a)).

We submit that the judgment of the District Court should be affirmed on the authority of the foregoing decisions. The position of the United States and the Commission was correct in *Andrews Van Lines* in 1965 and in *Acme* in 1937, and their position in 1937 and in 1965 cannot be reconciled with TOFC Rule 3 of 1964.

D. Appellants' contention that a motor carrier may perform a portion of its authorized service by shipping its loaded trailers by rail is erroneous.

We return now to appellants' contention, which we touched upon earlier, that if a motor carrier performs a substantial portion of its authorized service by operating motor vehicles upon the public highways, thereby maintaining its status as

a motor carrier, it may "perform . . . a portion of [its] authorized service by rail piggyback rather than over the highway. . . ." (Govt. pp. 53, 58; ATA p. 37.) There is no merit in this claim.

Not only do the authority provisions of Part II affirmatively require that authorized service be performed by motor vehicle on a public highway, but in addition they specifically and clearly state that the term 'motor vehicle' ". . . does not include any vehicle, locomotive, or car operated exclusively on a rail or rails." § 203(a)(13). Therefore, the authorized service performed by a motor carrier is defined by the statute to specifically exclude use of a flat car operated exclusively on rails. Contrary to the assertion of appellants that there is no prohibition of motor carrier use of rail TOFC services (Govt. p. 53; A.T.A. p. 37), the plain language of the Act excludes use of a rail car in performing motor carrier service.

In *Movement of Highway Trailers by Rail*, 293 I. C. C. 93, 100-101 (1954), sometimes called the *New Haven* case, the Commission held, as it now provides in Rule 1, that transportation of a trailer on a flat car is exclusively railroad transportation. Under § 203(a)(13) the trailer or semitrailer is a "motor vehicle" only so long as it is propelled or drawn by mechanical power upon the public highways. Therefore, neither the trailer nor the flat car is a 'motor vehicle' within the terms of the Act when in use in TOFC service.

Beyond the plain meaning of § 203(a)(13), the whole structure of Part II makes the appellants' argument untenable.

The whole of Part II is so drawn that the basic requirements prevail unless exceptions thereto are expressly provided. So it does not suffice to say that there is nothing in

the Act that forbids a motor carrier to ship by rail. The structure of Part II is such that a motor carrier's diversion of his vehicle from the highways to a railroad car under Rule 3 cannot be lawful, even for one occasion, unless affirmative statutory provisions exist that authorize that diversion. Admittedly, none exist.

Sections 202(c), 203(b), and 206(a), 49 U. S. C. §§ 302(c), 303(b), and (306(a), set forth exemptions from Part II. Persons, practices, services, and commodities not within these exemptions are covered by the Act. *McDonald* v. *Thompson*, 305 U. S. 263, 266 (1938); *United States* v. *Drum*, 368 U. S. 370, 373-374; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312 (1932). There is no provision that by even the remotest implication exempts or relieves a motor carrier from the general requirement that it must perform its authorized service by operating motor vehicles upon the highways.

On the other hand, there is a profusion of statutory provisions describing motor carrier service solely in terms of using motor vehicles on the highways. Sections 203, 206, and 209, containing many of these, were set forth above. Section 208(a), 49 U.S.C. § 308(a), provides in part:

> "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate. . . ."

The words "routes" and "territory within which" mean, respectively, regular and irregular routes over public highways. *United States* v. *Maher*, 307 U. S. 148, 154-155 (1938). "The words 'route' and 'routes' are manifestly used to signify the highways where the motor vehicle operates and

not just the areas between terminal points. . . . ." *Consolidated Freightways, Inc.* v. *United States,* 136 F.2d 921 (8th Cir. 1943), cert. den. 320 U. S. 781. It was there held that a motor common carrier may not operate on highways not specified in its certificate, even though they lie between points which it is authorized to serve and their use would increase the carrier's efficiency.

In *Manhattan Coach Lines, Inc.* v. *Adirondack Transit Lines, Inc.,* 43 M.C.C. 477, 482-483 (1944), the Commission held that a "grandfather" certificate authorizing a motor carrier to operate "across the Hudson River" between New Jersey and New York did not permit use of the Lincoln Tunnel under the river at approximately the same crossing site, since the tunnel was not in existence during the "grandfather" period and thus was not a "route" within the meaning of § 206(a)(1) upon which the carrier had been operating during the "grandfather" period. This holding was sustained in *Adirondack Transit Lines, Inc.* v. *United States,* 59 F. Supp. 503 (S. D. N. Y.), aff'd 324 U. S. 824. The Commission said that Adirondack could apply under § 207 for a certificate of public convenience and necessity to operate through the tunnel (p. 483).

Since a motor carrier may not leave the highways specified in its certificate or permit, even to use another highway, it follows that it may not leave its authorized highways to perform its authorized service by shipping its motor carrier traffic by rail.

Section 208(b) authorizes motor common carriers to "occasionally deviate" from their routes, under regulations prescribed by the Commission. The only deviations authorized by the Commission are to other highways. 49 C.F.R. § 211.1.

The only provision of the Act which specifically authorizes a motor carrier to put its trailers upon a railroad flat-

car is § 216(c), the through-route, joint-rate section, and this arrangement is voluntary. See Part IV, *infra*.

Neither the Commission in its report nor appellants here have attempted to invoke the aid of the common law, perhaps because it is so clear that the common law would not support their position. The reasoning in *Allied Van Lines, Inc., Common Carrier Application*, 46 M.C.C. 159 (1946), defeats any reliance on the common law. Allied was held not to be a motor common carrier under Part II because it was not operating motor vehicles upon the highways but was, instead, purchasing transportation from others. Allied contended that its operations met all of the requirements of a common carrier at common law. The Commission held that this was not enough; that to be a motor common carrier within the meaning of Part II a carrier must perform its service by operating motor vehicles upon the public highways. Quoting the definition of "common carrier by motor vehicle" in the Act, § 203(a)(14), the Commission said (at p. 189):

> "The definition of a common carrier in the Act is similar to the definitions usually given at common law . . . except the statutory definition is limited to transportation in interstate and foreign commerce and the qualification 'by motor vehicle' is added. . . . While the concept of a common carrier at common law is utilized in the statutory definition, that definition construed in the light of other provisions of the act is clear that a person who in fact operates motor vehicles is contemplated."

A similar holding was made in *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D.N.Y. 1940), aff'd 309 U. S. 638. After holding that forwarders who did not operate motor vehicles upon the highways were, for that reason, not motor common carriers within the meaning of Part II, the Court said (p. 973):

> "While the four forwarding companies are doubtless responsible to their customers as common carriers at common law, we think it clear that none of them is 'a common carrier by motor vehicle' within the meaning of the Motor Carrier Act. . . ."

To free a motor carrier on occasions of his own choosing from compliance with his statutory description—one who uses motor vehicles upon the highways in the transportation of property—is to create a mode of transportation unknown to and plainly not contemplated by the Act. It frees the motor carrier from his one essential and identifying feature, and leaves him, under appellants' theory, a free agent to do anything not expressly forbidden by the Act. The Commission has no such creative powers.

II

IN HARMONY WITH THE AUTHORITIES CITED ABOVE, THE COMMISSION IN COGNATE HOLDINGS ADHERED, UNTIL THE CASE AT BAR, TO THE PRINCIPLE THAT AN INTERSTATE MOTOR CARRIER MAY NOT PERFORM ITS AUTHORIZED SERVICE BY SHIPPING BY RAILROAD, OR BY OTHER CARRIER, FREIGHT TENDERED TO IT BY SHIPPERS.

A. The Substituted Freight Service Case

In *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939), the Commission held that "[T]o act as a common carrier by motor vehicle and as a shipper by rail as to the same service is . . . repugnant to the act . . ." The Government's characterization of that decision as "dictum" (p. 55) is wrong. It was a necessary holding upon issues presented by the facts. Consolidated Freight Lines was operating as a motor common carrier from the Pacific coast through Terry, Montana, to Minneapolis. Because of motor truck weight restrictions on the North Dakota highways, Consolidated adopted the practice of shipping in railroad boxcars

between Terry and Minneapolis freight tendered to it by shippers. It paid the railroad's carload rates and charged its shippers its own higher less-truckload rates. The Commission held (pp. 690, 691, 685) that Consolidated must discontinue shipping the freight by rail, and that any future joint traffic relations with the railroad must be handled by arranging through routes and joint rates as authorized by § 216(c) of the Act, 49 U.S.C. § 316(c). In discussing this problem the Commission cited (p. 688) *Acme Fast Freight*, 2 M.C.C. 415 (1937), 8 M.C.C. 211 (1938).

Substituted Freight Service was cited and followed in *Greer Broker Application*, 23 M.C.C. 417, 420 (1940); *Stone's Express Common Carrier Application*, 32 M.C.C. 525, 527 (1942); *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139, 141 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104-105 (1954); and in seventeen other cases cited in Appendix D to this brief.

The Commission overruled *Substituted Freight Service* and the cases that have followed it to the extent that they are in conflict with TOFC Rule 3. 322 I.C.C. at 336. In pages 331 to 336 the Commission attempts to explain its reasons.

In *Substituted Freight Service* the Commission specifically referred to the certificate provisions of the Act (p. 684), and said the principal issue was one of law, namely, whether the involved operations could be squared with the certificate and tariff provisions of Part II (p. 686). It posed the following specific question:

> "3. Why, when such through transportation is performed in fact partly by a common carrier subject to part I and partly by a motor carrier subject to part II of the Interstate Commerce Act, as amended, should

it not be performed *only* under duly filed joint rates, in accordance with the provisions of section 216(c) of part II of the act and of Rule 31 of the Commission's Tariff Circular No. 20, as amended!" (232 I.C.C. 692) (Emphasis supplied)

The Commission specifically rejected arguments, similar to those presented here, that a carrier could act simultaneously as a common carrier and a shipper (p. 687), by referring to the authority and certificate requirements of the Act (pp. 687, 688). In answer to the third question it held:

"3. The furnishing of the so-called substituted service without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs is in contravention of sections 216-217 and our regulations thereunder, including rule 31 and section 2 of Tariff Circular 20." (232 I.C.C. at 691.)

The rule mentioned in the finding was quoted earlier in the report as follows:

"Pursuant to section 217 and 218, we have issued regulations governing the filing and publishing of rates in connection with motor carriers, including section 2 of Tariff Circular 20, which deals with joint rates between motor carriers and common carriers subject to Part I, and rule 31 of that circular, which provides as follows:

'Where it is desired to establish arrangements for through transportation with motor carriers, joint rates in accordance with the provisions of section 216(c) of Part II of the Interstate Commerce Act and of the regulations applicable to joint rail-motor rates as provided in section 2 of this circular, as amended, should be established.'" (232 I.C.C. at 684-685)

Contrary to the Government's argument (Govt. p. 55), there was statutory authority cited for the holding.

A plea of inadvertence cannot survive here, because for more than twenty years after *Substituted Freight Service*, in a series of important cases, the Commission stoutly adhered to its *Substiuted Freight Service* holding, and each time it did so, it repeated those exact words of its original holding. The Commission itself admits (322 I.C.C. at 334) that "[C]ertain of our decisions, including *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139, 141, *Savage Application*, 265 I.C.C. 157, 167, and the *New Haven* case" [*Movement of Highway Trailers by Rail*, 293 I.C.C. 93], followed its literal holding in *Substituted Freight Service*, from which it now wishes to depart.

The Commission also says (p. 334) that *Greer*, 23 M.C.C. 417, and *Stone's Express*, 32 M.C.C. 525, are consistent with TOFC Rule 3, but that it is not correct; they plainly are in accord with *Ringsby*, *Savage*, and *New Haven*, and the other cases applying the plain language of *Substituted Freight Service*.

In *Ringsby*, 263 I.C.C. 139, the Commission denied the request of a motor common carrier that it compel a railroad to establish rates under which the motor carrier could ship its highway trailers by rail. The Commission cited *Substituted Freight Service* and said:

> "The principle announced, that such practices of common carriers by motor vehicle and by rail are repugnant to the provisions of the act, was adhered to in *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525, by division 5, and in other proceedings concerning applications of motor carriers for certificates of public convenience and necessity." (pp. 141-142.)

In *Greer*, 23 M.C.C. 417, 420, the Commission condemned as unlawful an arrangement under which a motor carrier shipped by another motor carrier freight tendered to it by shippers, citing seven sections of the Act and *Substituted Freight Service* as authority for the holding that this practice is "repugnant to the act."

B. Movement of Highway Trailers By Rail

In *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (1954), sometimes called the *New Haven* case, the Commission relied upon the *Acme Fast Freight* principle that transportation is not subject to Part II of the Act unless it is conducted by motor vehicles upon the public highways, and upon the *Substituted Freight Service* holding "that for a motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act."

The Commission held (pp. 100-101) that a railroad did not need authority under Part II of the Act to carry a highway trailer on a flatcar, since the trailer was not being operated upon a public highway, and the flatcar by definition in §203(a)(13) was not a motor vehicle. The Commission further held, therefore, that TOFC service is railroad transportation subject to Part I, "whether the trailers are owned or operated by railroads, shippers, or motor common carriers" (pp. 101, 106). The Commission reaffirmed this holding in the case at bar. 322 I. C. C. at 343.

In consonance with its foregoing holding, the Commission in *Movement of Highway Trailers by Rail* expressly reaffirmed the principle of *Substituted Freight Service* by pointing out that it would be unlawful for a railroad to accept for transportation under its open tariffs a trailer, tendered by a motor carrier, that was being operated in motor common carrier service subject to Part II of the Act (pp. 105-106).

III

ACME FAST FREIGHT AND SUBSTITUTED FREIGHT SERVICE WERE DECIDED BY MEN WHO WROTE PART II OF THE INTERSTATE COMMERCE ACT AND WHO WERE CHARGED WITH INITIATING ITS ADMINISTRATION. THEIR INTERPRETATION OF PART II IS ENTITLED TO SPECIAL WEIGHT AND SHOULD BE UPHELD. THEIR CONSTRUCTION OF THE ACT IN THESE CASES WAS FOLLOWED FOR MANY YEARS AND RECEIVED EXECUTIVE AND CONGRESSIONAL RECOGNITION AND ACCEPTANCE.

A. Acme Fast Freight and Substituted Freight Service were decided by men who wrote Part II and who were charged with initiating its administration.

In *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294 (1933), the Court said in respect to administrative construction of a statute:

> "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (p. 415.)

This statement was repeated in *United States* v. *Leslie Salt Co.,* 350 U. S. 383, 396 (1956), and in *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

Commissioners Eastman, Aitchison, Porter, Miller, Caskie, McManamy were members of the Commission during 1934-1935 while proposed Part II was before Congress. All of them joined in the report of the entire Commission written by Commissioner Eastman in 1938 in *Acme Fast Freight Application,* 8 M. C. C. 211. All of them except Commissioner McManamy joined in the report of the entire Commission in 1939 in *Substituted Freight Service,* 232 I. C. C. 683. Mr. McManamy had retired by then.

Commissioner Eastman literally wrote Part II of the Act while a member of the Commission and Federal Coordinator of Transportation, and guided it through Congress.[4] The Chairman of the Subcommittee of the House Interstate Commerce Committee called the bill which became Part II the "Eastman Bill." (Hearings on H. R. 5262, p. 1.) The Chairman of the Commission at that time, Mr. McManamy, testified before the Congressional Committees in support of proposed Part II; and it is clear from what he said that he and the other members of the Commission understood Part II and took an active interest in obtaining its passage.[5]

Additionally, the Commission conducted its own very extensive investigations of motor carrier transportation with a view to possible regulation in 1926-1927, *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, and in 1930-1932, *Coordination of Motor Transportation*, 182 I.C.C. 263. Commissioners Eastman, Aitchison, and Porter were members of the Commission during both investigations.

A better case than this could not be found for following the administrative construction of a statute or for giving effect to the principle stated in the three decisions of this Court last cited.

B. The Construction of Part II adopted by the Commission in Acme Fast Freight and Substituted Freight Service should be upheld here.

Having reviewed the decisions cited in preceding portions

4. S. Doc. 152, 73rd Cong., 2d Sess.; H. R. Doc. 89, 74th Cong., 1st Sess.; Hearings Before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1629, pp. 44-100; Hearings Before House Committee on Interstate Commerce, 74th Cong., 1st Sess., on H. R. 5262, pp. 23-49.

5. See note 4 supra, and Senate Hearings, pp. 116-123, and House Hearings, pp. 49-53.

of this brief, the Court below stated:

> "In the face of this settled interpretation of the Act by the Commission itself as well as the courts, the deference ordinarily due to the [new] construction of the Act by the administrative agency responsible for its enforcement is not called for." (Citing cases) (R. 40).

Where, as here, there has been a long continued and well supported construction of a statute by members of an administrative agency whose opinions are entitled to special weight, followed after many years by a reversal of that construction, the new interpretation is not entitled to the deference commonly accorded the construction of a statute by the agency charged with its enforcement. *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956). After quoting the excerpt from *Norwegian Nitrogen*, 288 U.S. at 294, set forth above, the Court said in *Leslie Salt* (p. 396):

> "Against the Treasury's longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied Congressional acquiescence."

To the same effect is *Blau* v. *Lehman*, 368 U. S. 403, 412-413 (1962).

C. The Commission's long continued construction of the Act, that a regulated motor carrier may not perform its authorized service by shipping by rail open tariff freight tendered to it by a shipper, was recognized and accepted by the Executive Department of the Government and by Congress in 1962 and 1963 in their proposals to amend § 2 of the Act so as to permit regulated motor carriers to ship their vehicles by rail.

Acme Fast Freight, 8 M. C. C. 211 (1938), aff'd 30 F. Supp. 968, aff'd 309 U. S. 638; *Substituted Freight Service*, 232 I. C. C. 683 (1939); *Movement of Highway Trailers by Rail*, 293 I. C. C. 93 (1954); and many other cases made it very plain that the Interstate Commerce Act does not permit a regulated motor carrier to perform its authorized service by shipping under a rail open tariff freight tendered to it by a shipper, or as otherwise stated, does not permit a regulated motor carrier to act as a carrier by motor vehicle and as a shipper by rail as to the same service. Acting under this principle for twenty-five years, the Commission denied many applications for motor carrier authority and entered numerous other orders vitally affecting motor, rail, and water carriers. See Appendices C and D hereto. Although Congress amended the Act many times during that period it took no action to disturb that construction of the Act.

Then in 1962 the President asked Congress to amend the Interstate Commerce Act to change that construction. H. R. Doc. 384, 87th Cong., 2d Sess., p. 5. The President's message proposed legislation to:

> "(4) Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques."

To implement the President's recommendation, the Secretary of Commerce in 1962 submitted identical bills to the Senate and the House. S. 3242, 87th Cong., 2d Sess., contained the following provision (Hearings on S. 3242 before the Senate Commerce Committee, 87th Cong., 2d Sess., p. 18):

> "Sec. 3. (a) Section 2 of the Interstate Commerce Act (49 U.S.C. 2) is amended by inserting '(a)' after 'Sec. 2' and by adding at the end thereof the following new subsection:
>
> "'(b) Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated.'"

In the hearings on these bills before the Senate and House Commerce Committees, the Secretary of Commerce urged their enactment. To provide a more detailed explanation, the Secretary introduced the Under Secretary of Commerce for Transportation, who stated that the purpose of Section 3 of the bill was to change the principle "set forth in the key decision Movement of Highway Trailers by Rail (293 I.C.C. 93 (1954)) and other decisions" so as to require railroads to accept shipments of trailers tendered by motor carriers as shippers. (Senate Hearings, pp. 29, 33.)

The Assistant Attorney General, representing the Department of Justice, after making a statement respecting other proposed legislation before the Committee said (Senate Hearings, p. 67):

> "In connection with S. 3242 on which the committee is also hearing testimony, the Department defers to the Commerce Department for presentation of the Administration's proposals contained in that bill since the provisions of that bill do not directly relate to our enforcement responsibilities under the antitrust laws."

It may be noted that the Government could find no competitive or monopoly problems warranting its attention in 1962.

The Chairman of the Interstate Commerce Commission told the Senate Committee that the Commission agreed with the "basic objective" of the proposed legislation but that its enactment "could have far reaching effects" and that the "ramifications" of the bill "are far reaching and could drastically affect basic and long-established relationships between carriers." Therefore, he said, the Commission wanted more time to study the proposal. (Senate Hearings, pp. 165-167.)

Near the end of the I.C.C. Chairman's testimony the following colloquy took place between him and the Chairman of the Senate Committee:

"The Chairman. At that point, Mr. Chairman, where the Commission ruled that one could not act as a common carrier by motor vehicle and as a shipper by rail as to the same shipment, supposing that a contractual arrangement was made by a motor common carrier with a railroad to ship piggyback certain items. In order to do that they would have to have a change in the law, would they not?

"Mr. Murphy. I am not certain of that, Mr. Chairman. They can today enter into joint rates—

"The Chairman. I suppose part of the way by piggyback and truck and then you put it on the railroad. Say the motor carrier made a contract with the railroad.

"Mr. Murphy. I think perhaps there would have to be some clarification for him to do that, even though today they can enter into joint rates and routes." (Senate Hearings, p. 166.)

Mr. Murphy. "Other questions to be explored would be the propriety of a motor carrier hiring transportation from another mode for a portion of a haul and assessing the shipper or consignee all motor rates under its own tariff, and to what extent a motor carrier may be permitted to substitute rail for motor service without, in effect, constituting an abandonment of service.

The Chairman. "That is what I was talking about. It would seem to me the present law—I am thinking out loud here—and the proposed law, would have to be clarified in either or both cases.

Mr. Murphy. "Yes sir." (Senate Hearings, p. 167.)

At no time did Mr. Murphy, or anyone else on behalf of the Commission, tell the Committee that no legislation was necessary because the Commission had the power it now seeks to exert in the form of TOFC Rules 2 and 3. Instead, the Chairman of the Commission admitted that the "present law" and the "proposed law" would have to be "clarified" in order to make lawful the practices that would be authorized by those Rules. Clarification of a Federal statute is exclusively a function of Congress. *Blau* v. *Lehman*, 368 U. S. 403 (1962).

Statements to the Senate Commerce Committee were made in support of S. 3242 in 1962 by the General Counsel of the Department of Commerce, the General Counsel of the Department of Defense, the General Counsel of the Treasury, the Secretary of Agriculture, the Comptroller General of the United States, the General Services Administration, the Executive Office of the President, the Executive Director of the Military Traffic Management Agency of the Department of Defense, the Commissioner of the Transportation and Communications Service of the General Services Administration, and the Post Office Department. (Senate Committee Hearings, pp. 122-130, 189-207.)

These statements were all to the effect that the proposed legislation was necessary to accomplish the announced purpose of the President's proposal, and no one indicated in any way the view that all of this effort was unnecessary because the Commission already had authority under § 2 or some other provision to require railroads to accept vehicles or containers tendered by other carriers as shippers.

The presentation so made to the Senate Committee on behalf of S. 3242 was duplicated in the same session of Congress before the House Interstate Commerce Committee in support of the House counterpart of the Senate bill, H. R. 11584. (Hearings Before The House Committee on Interstate Commerce on H. R. 11584, 87th Cong., 2d Sess.)

No action was taken on either bill in the 87th Congress, 2d Session.

In 1963, in the 88th Congress, 1st Session, similarly worded bills to amend § 2 were introduced, S. 1062 and H. R. 4701. Committee hearings were held. Both bills were supported by the same government departments and other interests that had advocated enactment of the similar bills in 1962. (Hearings Before the Senate Committee on Commerce, 88th Cong., 1st Sess., on S. 1062; Hearings Before the House Committee on Interstate Commerce, 88th Cong., 1st Sess., on H. R. 4701.)

The Assistant Attorney General made the following position statement in the Senate hearings:

> "Mr. Orrick. Thank you, Mr. Chairman, I have with me a man I would like to introduce, Joseph Saunders, who is Chief of our Public Counsel Section.
>
> "I appear today to present the views of the Department of Justice on S. 1061 and S. 1062. The Department of Justice continues to favor enactment of these measures.
>
> "With respect to S. 1062, we defer generally to the view of the Department of Commerce. However, we do suggest an amendment to section 2 of the bill which relates to experiments in rate, classification, and documentation systems, as well as service combinations." (pp. 854, 857)

While most of the statements were duplicates of those

made in 1962, a few witnesses added to their earlier testimony.

The Chief Counsel (Public Affairs), American Trucking Associations, Inc., said in Part:

> "[S]ection 3 . . . is intended to carry out the President's recommendation that all carriers should have the right to—ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers.
>
> "Now we strongly endorse this objective but we think the proposal itself is seriously defective. Modern piggyback service, which is the innovation responsible for this recommendation, involves some rather complex and complicated carrier-shipper relationships. It is far easier to recognize a need for broadened use of the service than to enunciate a proper solution of the problem created.
>
> "Among other things to be considered is the maintenance of carriers as carriers and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented.
>
> "We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers as carriers." (Senate Committee Hearings, p. 479.)

The proposed legislation, section 3 of the bills to implement the proposals of the President and the Department of Commerce, was not enacted. Commissioner Webb, commenting on the record of the hearings stated: "That record shows that legislation to require the performance of open-tariff TOFC service attracted virtually no support." (322 I.C.C. 388)

The only Congressional Committee Report that emerged from these hearings, H. R. Report No. 1144, 88th Cong., 2d Sess., recommended enactment of some of the provisions of

H. R. 4701, but it called attention to the fact that it was omitting section 3 from consideration (p. 7). So section 3 died in Committee.

In these Committee hearings in 1962 and 1963 the Commission took occasion to urge enactment of legislation which it had proposed to amend § 216(c), 49 U. S. C. § 316(c), to give the Commission power to compel railroads and motor carriers to enter into joint carrier arrangements for through routes and joint rates. These bills were S. 3510 and H. R. 12362, 87th Congress, and S. 676 and H. R. 2088, 88th Congress. (In 87th Cong., 2d Sess., Hearings on S. 3242, pp. 165-166, 167; Hearings on H. R. 11584, pp. 130, 131. In 88th Cong., 1st Sess., Hearings on S. 1062, p. 800; Hearings on H. R. 4701, p. 742.)

The District Court concluded that the construction of the Act adopted in the Court and Commission decisions which we have cited in Parts I and II of our brief had been recognized and accepted by both the executive and legislative branches of the Government. (R. 40-41.) "This contemporaneous interpretation of the [Act] by the agency charged with its supervision—an interpretation followed by all agencies of the Government—together with acquiescence of the Congress, must be given great weight." *United States* v. *Bergh*, 352 U. S. 40, 46-47 (1956). For similar holdings see *Blau* v. *Lehman*, 368 U. S. 403, 412-413 (1962), and *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

IV

RULES 2 AND 3 WILL COMPEL ESTABLISHMENT OF THROUGH ROUTES IN VIOLATION OF SECTIONS 216(c) AND 15(3) OF THE INTERSTATE COMMERCE ACT.

The court below, upon careful analysis, found that Rules 2 and 3 would compel the railroads to participate in through routes and thus are in violation of sections 216(c) and 15(3) of the Act (R. 30-35).

The Government and ATA argue that through routes would not be established if operations were undertaken pursuant to Rules 2 and 3. (Govt. pp. 59-62, ATA pp. 31-33.) The first error occurs in defining the factual elements of a through route. With respect to a through route, the Government urged that:

> "Under such an arrangement the rail carrier and the motor carrier jointly publish a tariff whose rates, terms and conditions they have jointly established, and they share in an agreed-upon division of the revenues." (p. 61)

The argument improperly assumes that joint rates or some other express arrangements jointly arrived at are essential to the creation of a through route. The Commission did not make that mistake. It acknowledged that:

> "It is, of course, well established that what is a through route is a matter of fact, and that a through route may be found to exist in the absence of a joint rate or any other express arrangement between the carriers involved." (322 I.C.C. at 334)

In *Thompson* v. *United States*, 343 U.S. 549 (1952), the Court stated:

> "The statutory term 'through route,' used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> > 'A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals"

> on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Routes and Through Rates, 12 I.C.C. 163, 166.
>
> • • •
>
> In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." (pp. 556-557.) (footnotes omitted.)

In *Denver & R.G.W. R.R.* v. *Union Pacific R.R.*, 351 U.S. 321, 327 (1956), it was made plain that through routes may exist even though not provided for in formal contracts or tariffs.

Apart from asserting that railroads would not be subject to compulsion, the Commission's report sets out no analysis of the facts surrounding a proposed arrangement under Rules 2 and 3 to justify a conclusion that through routes are not involved.

The tests of a through route laid down in *Through Routes and Through Rates*, 12 I.C.C. 163, 165-66 (1907), are clearly met by operations under Rules 2 and 3. A shipment moving under Rules 2 and 3 moves upon a rate existing at the time the bill of lading is issued by the motor carrier to its shipper. It moves upon one through journey, not upon a succession of journeys. When the shipment is tendered to the initiating motor carrier, for movement over one of two routes, all-motor or motor-rail-motor, and accepted by the motor carrier, a contract for a through movement from A to D has been created, not a contract for movement from A to B by motor, a separate contract for a TOFC movement from B to C, and a third contract for motor service from C to D.

Under the so-called open-tariff rules, a route will be created by continuous motor-rail-motor service formed by an arrangement, not expressly created by the carriers, but by the Rules of the Commission, between connecting carriers. The route offered will be a new unit, one line of service formed of two or more connecting carriers, and the rate tendered to the shipper for every service will be a unit. The through carriage, motor-rail-motor, will be covered by a single through rate for the shipper, all the terms of which will be fixed at one and the same time.

No intervention of the shipper is required under Rules 2 and 3 at the transfer points between carriers, thus creating a through route.[6] The manner in which the entire rate charged the shipper is apportioned among the carriers is unimportant.[7] Any arrangement for continuous carriage over the lines of two or more carriers in interstate traffic constitutes assent to a through route, since through carriage implies the existence of a through route.

Appellants assert that there is no holding out by the railroad of service, yet it is acknowledged that the shipper is advised that rail TOFC service may be used unless he stipulates to the contrary. (Govt. p. 61, ATA p. 31.) That advice to the shipper constitutes a holding-out to the shipper of two possible routes for performing his transportation, one involving rail service. To advise the shipper by tariff is to hold out to him. The court below properly disposed of the argument that no through route exists because the holding out on behalf of the railroad is by the motor carrier without railroad concurrence.

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6. *Hausman Steel Co.* v. *Seaboard Freight Lines*, 32 M.C.C. 31, 38 (1942); *Lourie Mfg. Co.* v. *Cincinnati Northern R. R.*, 42 I.C.C. 448, 450 (1916).

7. *United States* v. *Pennsylvania R. R.*, 153 Fed. 625 (W.D. N.Y. 1907); see, also, *United States* v. *Wood*, 145 Fed. 405, 411 (E.D. Pa. 1906).

> "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route." (R. 33)

Furthermore, there is no essential difference in the "holding out" of through service under Plan I and the "holding out" of through service under the so-called open tariff arrangements except for the railroads' voluntary concurrence in the publication of tariffs applying to Plan I operations. The court so found (R. 34), and the government at no point answers the finding by distinguishing Plan I arrangements from the so-called open tariff arrangements. The Commission found that Plan I involved the establishment of through routes (322 I.C.C. at 343, 349.) Substitute services involve a joint service requiring compliance with Section 216(c) and the filing of concurrences in applicable tariffs.[8]

The substitute for a voluntary holding-out is a compulsory holding-out under the impact of Rules 2 and 3. Rule 2 reads in terms of "shall" not "may". The court below correctly appraised the degree of compulsion involved should these rules be implemented (R. 33).

The common law contemplated voluntary relationships between carriers.[9] Section 216(c) specifically preserves that relationship as between motor carriers and railroads.

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8. *Truck Trailers on Flatcars, Utah, Idaho, Oregon and Washington*, 292 I.C.C. 395, 396-397; 298 I.C.C. 533, 533-536; *Iron and Steel Articles—Eastern Common Carriers*, 305 I.C.C. 309; *Union Pacific Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279, 283.

9. *Express Cases*, 117 U.S. 1, 26-29; *Central Stock Yards Co.* v. *Louisville & N. Ry.*, 192 U.S. 568, 571 (1904); *Louisville & N. Ry. Co.* v. *West Coast Naval Stores Co.*, 198 U.S. 483, 497-500 (1905); *Southern Pacific Co.* v. *I.C.C.*, 200 U.S. 536, 556 (1906).

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945) this court said:

> "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers.7"

> "7. 10 M.C.C. (F) 235, 236:
> "We are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation * * * *"

Here the Commission is attempting to reverse the Supreme Court and its own prior decisions and amend the Interstate Commerce Act by establishing Rules 2 and 3 that *will* "compel rail carriers to coordinate their service with motor carriers."

The principle so stated by the Supreme Court in *Parker* was at the heart of its decision. The question was whether the Commission had power under Part II to grant motor carrier operating authority to a rail-owned motor carrier in order to supplement rail service. Independent non-rail motor carriers protested that they were available and willing to furnish the railroad all the coordinated service it needed. The Court held (p. 73) that "in the absence of power to compel coordination between modes of transportation" the Commission could grant the desired rights to a rail-owned motor carrier whose complete cooperation with the owning railroad was assured.

That decision became the foundation for a governing principle that has prevailed ever since and under which

there has been granted a large amount of motor carrier authority to railroads and rail-owned motor carriers, restricted to service supplemental to rail operations.

The Commission's statement of the law in *Kansas City Southern Transport Company, Inc., Common Carrier Application,* 10 M.C.C. 221 (1938), relied upon by the Supreme Court was not an isolated expression on the subject. In *Gulf, M. & No. R.R. Common Carrier Application,* 18 M.C.C. 721 (1939), the Commission said at page 726:

> "Furthermore we are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates, and we have no power to require their establishment. Any such plan must be dependent upon their voluntary cooperation."

Similar language was used in *Rock Island Motor Transit Co. Common Carrier Application,* 21 M.C.C. 513, 518 (1940); *Louisiana, A. & T. Ry. Co., Common Carrier Application,* 22 M.C.C. 213, 216 (1940); *Missouri Pacific R. Co. Common Carrier Application,* 22 M.C.C. 321, 331 (1940); *Kansas City Southern Transport Co., Inc., Common Carrier Application,* 28 M.C.C. 5, 8 (1941); *Chicago & N. W. Ry. Co. Extension of Operation—Iowa,* 31 M.C.C. 455, 458 (1941); and *Lake Shore Cartage Co., Inc., Extension—Elyria, Ohio,* 42 M.C.C. 684, 686 (1943).

The Commission has consistently held that one carrier may not absorb the line-haul charges of another carrier and thereby create an involuntary through route.[10] It has per-

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10. *Commodity Rates on Brick From Danville to Bronson,* 63 I.C.C. 277, 278; *Coal Rates on the Story Fork Branch,* 26 I.C.C. 168, 173; *Cord and Pulp Wood to Canton,* 78 I.C.C. 593, 596; *Handling Carload Shipments in West,* 246 I.C.C. 57, 72 (modified on other grounds 246 I.C.C. 715).

mitted motor carriers to publish tariff provisions to insure that their local rates were not used in the creation of through routes.[11]

Where Congress has specifically provided for the means of coordinating motor and rail services, the specifics of that provision must prevail over any general non-specific authority. Cf. *Maurer* v. *Hamilton,* 309 U.S. 598, 612-615.

In its 59th Annual Report to Congress, 1945, the Commission reported on this court's decision in *Parker*, supra, p. 72. It subsequently requested Congress to amend Section 216(c). (See page 50, *supra.*) In spite of repeated requests Congress has refused to amend that section. In these circumstances, the Act should not be construed to contain some ambiguous authority that permits the Commission to issue Rules 2 and 3.[12]

The Court below correctly pointed out that the "full hearing" required for the establishment of through routes for water carriers has not been held.

Rules 2 and 3 illegally compel the establishment of through routes.

V

THE RAILROADS' REFUSAL TO PERMIT MOTOR CARRIERS TO USE THE RAILROADS' TOFC OPEN TARIFFS DOES NOT VIOLATE THE ANTI-DISCRIMINATION PROVISIONS OF THE INTERSTATE COMMERCE ACT.

The Government (pp. 24-52) and ATA (pp. 24-29) argue that the railroads' refusal to permit motor carriers to use the railroads' TOFC open tariffs violates the anti-discrimination provisions of the Interstate Commerce Act, and that

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11. *East South Joint Rates and Routes, Cancellation,* 44 M.C.C. 747; *Southeast Shippers Association, Inc.,* 54 M.C.C. 770.

12. *Maurer* v. *Hamilton,* supra; *Blau* v. *Lehman,* 368 U.S. 403, 412-413 (1962); *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U.S. 284, 296 (1954).

TOFC Rules 2 and 3 are a valid exercise of the Commission's power to prevent that discrimination.

Although Rules 2 and 3 unleashed a novel and unprecedented sweep of power, no statutory authority for their promulgation is suggested in the Commission's report except by an indirect reference to § 2 of the Act, 49 U. S. C. § 2, and the circumstance that Rule 2 paraphrases a part of § 2. (322 I. C. C. at 335-336, 413). The District Court concluded that the Commission had rested its authority on that section, albeit "[W]e cannot say that the Commission's Report is a model of clarity, guiding the court unerringly to the statutory source of the power relied upon." (R. 23-25.)

Then, holding that § 2 must be read *in pari materia* with § 3(1) of the Act, 49 U. S. C. § 3(1), the Court held Rules 2 and 3 were in conflict with the proviso to § 3(1). Paragraph (1) of § 3, after detailing forbidden discriminatory practices, goes on to say:

> "Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Court held that the proviso was effective to exclude "from the railroad's obligation of equal service 'the traffic of any other carrier of whatever description.'" (R. 25-27.)

Appellants' briefs now cite §§ 1(4) and 3(1) as additional authority to support Rules 2 and 3. The task of trying to establish a violation of the anti-discrimination provisions has not and cannot be accomplished. In the first place, the arguments presented are not those used by the Commission in reaching its decision. Secondly, the arguments call for a construction of §§ 2 and 3(1) that is contrary to their plain language, their settled construction by the Commission and courts, and their legislative history. Lastly, § 1(4) has

not been held to apply to demands for service by a carrier acting as a carrier.

A. Statutory grounds not invoked and analyzed by the Commission may not be used here to support the Report.

As the court below said, the administrative action must be measured solely against the statutory grounds invoked by the agency and the court may not seek its own justification or accept appellate counsel's *post hoc* rationalizations (R. 23).

At no point in the brief two paragraphs adverting to the only statutory provision mentioned (322 I.C.C. at 335-36) does the Commission specifically hold that § 2 affirmatively requires railroads to offer TOFC service to competing carriers. The Commission stopped short of such a holding, stating only that it could see ". . . no reason why the fact that a user of TOFC service was another carrier rather than a private shipper would compel the conclusion that dissimilar circumstances and conditions were present" (322 I.C.C. at 335-36). In the same vein, it was stated that ". . . when TOFC service is offered by a rail carrier to the public generally, there is nothing to preclude its use by motor or water common or contract carriers . . ." These negative findings were the only ones that could be made in the state of record. Since the issue of the similarity between carriers and private shippers was not tried, affirmative findings based on evidence of record could not be made.

Nevertheless, the court below said:

> "We may accept, therefore, the argument of counsel for the government, despite the ambiguity of the Report's reference and discussion, that the Commission invoked Section 2 as authority for its Rules." (R. 25)

Quite evidently, counsel for the government in the court below did not urge that the Commission had invoked §§ 1(4) or 3(1) as authority for its Rules.

The vast implications of holding that a competing carrier, acting in the performance of its authorized service, should have the same right as an ordinary shipper to demand transportation under § 1(4) were nowhere examined by the Commission. The term "transportation" includes cars and other vehicles. 49 U.S.C. § 1(3)(a). Would it be in the public interest to permit a rail, motor or water carrier to limit its investment in equipment, with the knowledge that it would be able to demand that a railroad supplement its equipment supply in times of shortage by reason of the obligations created by § 1(4)? Is it in the public interest, and will it stimulate competition, to require a railroad that has devoted great energy and substantial funds to the development of a major improvement in equipment to forthwith make that equipment available for use by competing rail, water or motor carriers in other than a joint service? See *Grain in Multiple-Car Shipments—River Crossings To The South,* 318 I.C.C. 641, 321 I.C.C. 582; reversed *Cincinnati, N. O. & T. P. R. Co.* v. *United States,* 229 F.Supp. 572 (DC Ohio 1964), vacated *Arrow Transp. Co.* v. *Cincinnati, N. O. & T. P. R. Co.,* 379 U.S. 642 (1965); 325 I.C.C. 752 (1965). Whether the Commission would have made this sweeping and revolutionary change in transportation cannot be determined from the Report, for there was no analysis of § 1(4). The implications of the conclusion sought by Government counsel go far beyond the area of TOFC service.

Set out below are numerous commission decisions holding that § 3(1) does not apply to the relations between carriers. The Commission did not meet the plain language of § 3(1), did not distinguish its past decisions and did not set out a

construction of § 3(1) in the manner suggested by counsel for the Government here.

Accordingly, arguments with reference to §§ 1(4) and 3(1) are not properly available to support the Commission's decision as to Rules 2 and 3.

B. Section 2 deals only with discrimination in Compensation between shippers.

The court below found that, by its terms, § 2 "deals only with discrimination in rates, and does not extend to a discriminatory refusal to provide service at all." (R. 25) In addition to the plain meaning of the section, the courts and the Commission have uniformly held that § 2 applies to discrimination in compensation and that § 3, while broad enough to cover every form of unjust discrimination, is the section dealing with discriminations in service.[13] The Government concedes that section 2 in terms applies only to differences in the charge exacted for a service. It argues that the practical economic effect of a refusal to serve and of a discriminatorily high rate are often the same (Govt. pp. 30-31). The fact that two different courses of conduct may produce the same practical effect does not result in making § 2 applicable to both situations. Section 2 must be read and applied as Congress has written it, particularly when § 3(1) makes it plain that no omission in statutory structure is involved.

This court said in *Wight* v. *United States*, 167 U.S. 512, 517 (1897), that: "The wrong prohibited by the section is a discrimination between shippers." The Commission said in

13. *United States* v. *Delaware, L. & W. R.R.*, 40 Fed. 101, 103 (N.Y. 1889); *United States* v. *Hanley*, 71 Fed. 672, 673 (N.D. Ill. 1896); *Pacific Lumber Co.* v. *Northwestern Pac. R. R.*, 51 I.C.C. 738, 760 (1918); *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. R.*, 229 I.C.C. 497, 500 (1938); *Board of Trade, City of Chicago* v. *Grand Trunk W. R. R.*, 255 I.C.C. 141, 148 (1943).

Eastern Central Motor Carriers Assn. v. *Baltimore & O. R.R.*, 314 I.C.C. 5, (1961),[14] that:

> "It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers."

The courts and the Commission have taken competitive circumstances into account in Section 2 proceedings. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), the railroads were permitted to place in effect lower rates for import traffic originating outside the country than for domestic shipments in order to meet water competition. In *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960) the Commission analyzed section 2 and the prior Court and Commission cases stating at page 368:[15]

> "In its report, the division concluded that the decision in Wight v. United States, supra, [167 U.S. 512] whereby a carrier may not accord to one shipper a lower charge than is accorded another for the transportation of the same commodity between the same points, did not change the principle established in Texas & P.

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14. *Aff'd sub nom. Cooper-Jarrett* v. *United States*, 226 F. Supp. 318 (W.D. Mo. 1964); *aff'd* 379 U.S. 6. See also, *Sioux City & N. O. Barge Lines* v. *Chicago & N. W. Ry.*, 303 I.C.C. 537, 562 (1958); *Federal Barge Lines, Inc.* v. *Alton & S. R.* 303 I.C.C. 669, 679 (1938); *Pickup and Delivery—Official Territory—Less than Carload and Any Quantity*, 314 I.C.C. 313, 318 (1961); *Volume Rates on Processed Meat—Midwest to Ports*, 322 I.C.C. 456, 470 (1964).

15. For other cases in which the economics of the situation and competition were condensed as relevant see *Reduced Rates on Coal From The East to the Southwest* 292 I.C.C. 119, 137 (1954); *Soybean Oil, Tank Car Lots from Iowa to Hammond, Ind.*, 309 I.C.C. 663, 670-671 (1960); *Coal from Ill., Ind., and Ky. to Ill. and Ind.*, 308 I.C.C. 673, 678 (1959); *Koppers Co. Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 394 (1958) aff'd 166 F. Supp. 96. *Coal From Clinton, Linton Districts, Ind., to Milwaukee*, 311 I.C.C. 788, 793 (1960); *Volume Rates on Processed Meal—Midwest to Ports*, 322 I.C.C. 456, 469 (1964).

> Ry. Co. v. Interstate Commerce Commission, supra, [162 U.S. 196] that it is necessary to look to the total transportation service, and accord due consideration to the economic as well as the physical facts. Similar conclusions reached in Koppers Co. Inc., v. Chesapeake & O. Ry. Co., supra, [301 I.C.C. 284, 303 I.C.C. 383] were upheld in Koppers Co., Inc. v. United States, 166 F. Supp. 96."

Accordingly, § 2 standing alone does not constitute authority for Rules 2 and 3.

The Government contends that it need not stop with § 2, but goes on to invoke §§ 1(4) and 3(1). We set to one side for the moment treatment of § 1(4) and go to § 3(1).

C. TOFC Rules 2 and 3 are unlawful because of their conflict with Section 3(1).

1. THE EFFECT OF THE PROVISO TO SECTION 3(1).

The Government attempts to escape from the proviso by way of two related theories which it summarizes as follows (pp. 36-37):

> "[S]o elastic is section 3(1) that a carrier which suffered a diversion of traffic to a competing carrier by reason of the latter's lower rates or superior service could conceivably invoke Section 3(1). The proviso to the section was intended to close that avenue of attack. It was not intended to go further and permit a railroad to discriminate as between shippers because one shipper was also a carrier. This is apparent from the language of the proviso itself. It exempts only discrimination against the 'traffic' of another carrier. This term signifies the custom of the carrier—the business it enjoys when a shipper entrusts his goods to it for transportation, not a carrier's tender of trailers—its own or others', laden or empty—for rail transportation like a conventional shipper. . . . The legislative history strongly supports this construction."

The Government is totally wrong on all details of that statement, and on the conclusion it attempts to draw from them. "Traffic" as used in the Interstate Commerce Act is a term of art which means the goods that have been delivered to the carrier by a shipper for transportation. The TOFC Rules use the word "traffic" in exactly that same sense. Both the Act and the Rules plainly identify "traffic" as meaning the loaded or empty trailers tendered by the motor carrier to the railroad. And the legislative history of the proviso shows that the proviso authorizes railroads to discriminate against exactly that kind of "traffic." We turn first to that legislative history.

2. Legislative History of the Proviso to Section 3(1)

Section 3(1) had its origin in the first paragraph (unnumbered) of § 3 of the original Interstate Commerce Act of 1887. 24 Stat. 380. The proviso was added in 1940. 54 Stat. 902. When Part II of the Act was passed in 1935 it included § 216(d) which was obviously intended to be a counterpart of § 3(1), except that § 216(d) contained its present proviso. 49 Stat. 558. The first sentence of the present § 216(d) was added in 1940. 54 Stat. 924.

I.C.C. Commissioner Joseph B. Eastman, appearing before the Senate Committee on Interstate Commerce in April, 1939, explained the origin of the proviso to § 216(d) in the Act of 1935, and recommended that a similar proviso be added to § 3(1). The Bill before the Committee was S. 2009, which became the Transportation Act of 1940. Mr. Eastman said:

> "With regard to preference and prejudice provisions: Section 216(d) of the Motor Carrier Act is the equivalent of section 3(1) of part 1 and prohibits, among other things, undue preference of or prejudice to any particular 'description of traffic.' The motor carriers feared that this might be construed to include

railroad traffic, and therefore this proviso was added by the Senate committee:

> *"Provided, however,* That this paragraph shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.
>
> "In section 6 of S. 2009, which contains equivalent provisions, this proviso has been omitted. I can see no sound reason for this omission."
>
> (Hearings before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1310, S. 2016, S. 1869, and S. 2009, p. 793.)

To the plain language of the proviso to § 216(d) was thus added the plain language of Commissioner Eastman that the proviso was intended to assure motor carriers that § 216(d) would not apply to practices of motor carriers that bring about discriminations, prejudice, or disadvantage to the traffic of railroads. There are no exceptions or limitations in the purpose described by Mr. Eastman or in the language adopted to effectuate that purpose. Mr. Eastman literally wrote Part II of the Act while a member of the Commission and Federal Coordinator of Transportation, and guided it through Congress. See note 4, *supra.* The House Bill that became Part II was referred to as the "Eastman Bill" by the Chairman of a Subcommittee of the House Committee on Interstate Commerce that conducted the hearings on the Bill. (Hearings on H. R. 5262, p. 1.) Mr. Eastman as a member of Division 5 of the Commission was one of the men charged with administering Part II in its early years. His views on Part II and its legislative history are entitled to unusual weight. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

"Section 6 of S. 2009," referred to by Mr. Eastman, was a proposed composite of §§ 3(1) and 216(d) and a similar

provision in the pending bill for a Water Carrier Act, but the proviso of §216(d) had been omitted from the composite. He recommended that the proviso be restored, and this was done by the Committee. S. Rep. No. 433, 76th Cong., 1st Sess., p. 11.

The Conference Committee on S. 2009 split the composite into the present §§ 216(d), 3(1), and 305(c), 49 U. S. C. § 905(c), and added the proviso to the last two. H. R. Rep. No. 2832, 76th Cong., 3d Sess., August 7, 1940, pp. 65-66. The Conference Committee said in respect to § 3(1):

> "The conference substitute in section 5 . . . adds a proviso that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(1) was enacted, with the proviso, 54 Stat. 902, in the form recommended in the Conference Committee Report, p. 6. Its language remains the same today.

If follows that the proviso to § 3(1) must be given the same plain meaning construction as that expressed by Commissioner Eastman in respect to the proviso to § 216(d): That § 3(1) does not apply to practices of railroads that bring about "discriminations, prejudice, or disadvantage to the traffic of" motor carriers.

3. Senator Wheeler's Statement

The Government and ATA do not mention Commissioner Eastman's explanation of the origin and purpose of the proviso to § 216(d). They rely upon a statement by Senator Wheeler (79 Cong. Rec. 5656) which is set forth in full in ATA's brief (ATA pp. 27-28; Govt. pp. 37, 62). Appellants' reliance upon this material is misplaced. It actually supports our position.

(1) Senator Wheeler said that adding the proviso to § 216(d) was not necessary for the protection of motor carriers from claims of discrimination against railroads, since the language of § 3(1) without the proviso, from which § 216(d) had been copied, had always "been interpreted as covering unequal and unjust treatment by a carrier of its *patrons*. However, as I said, to make assurance double sure, this provision was added." (Emphasis supplied.) The Senator plainly used *patrons* as meaning someone other than carriers competing with railroads; he obviously meant ordinary shippers as contrasted with carriers.

(2) The Senator's reference to rates was, in the whole context of his remarks, only an illustration of one application of the proviso, not a description of its total coverage. For example, he said that words in § 3(1) similar to those in § 216(d) cover "unequal and unjust treatment." Surely it cannot be maintained that a legislator of Senator Wheeler's background and experience was telling the Senate that the broad language of these sections applied only to rates.

(3) In any event, no legislative history has been revealed that overcomes the plain meaning of § 216(d) that it applies to service as well as rates. *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

The District Court considered the same argument that appellants make here and rejected it (R. 27).

4. The "Traffic" of a Carrier

The "traffic" of a carrier means the goods that have been delivered to the carrier by a shipper for transportation.[16]

16. Interstate Commerce Act, Part II (motor carriers):
Sec. 216(i) 49 U.S.C. § 316(i). "In the exercise of its power to prescribe just and reasonable rates . . . the Commission shall give due consideration. . . . to the effect of rates upon the move-

Note that the word "traffic" in §§ 216(i) and 3(4) in the note is in the same sections, and is used in the same context, as the same word in the provisos to §§ 216(d) and 3(1).

The Commission's TOFC Rules use the same meaning of "traffic." Rule 2 employs the words "a like and contemporaneous service in the transportation of a like kind of *"traffic."* Rule 3(e) requires in respect to open-tariff service that motor and water carriers "shall tender *traffic* to and

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ment of *traffic* by the carrier . . ."

Sec. 218(b). "[T]he Commission shall give due consideration to the . . . effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of *traffic* by such carriers."

Part I (railroads):

Sec. 3(4), 49 U.S.C. § 3(4). "All carriers subject to the provisions of this part shall . . . afford all reasonable, proper, and equal facilities for the interchange of *traffic* between their respective lines and connecting lines . . ." [including water carriers subject to Part III.]

Sec. 15(4). "[I]n prescribing through routes the Commission shall . . . give reasonable preference to the carrier by railroad which originates the *traffic.*"

Sec. 15a(2). "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of *traffic* by the carrier or carriers for which the rates are prescribed . . ."

Sec. 15a(4). "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the *traffic* by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the *traffic* of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

Sec. 5(1). "Except upon specific approval by order of the Commission . . . it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of *traffic,* or of service, or of gross or net earnings, or of any portion thereof . . ."

receive *traffic* from rail carriers only at points which the motor and water carriers are authorized to serve." Rule 4(d) provides that "Carriers participating in joint intermodal TOFC service shall interchange *traffic* only at a common point of service." (322 I.C.C. at 413-414.)

The *traffic* denominated in the provisions of the Act recited in note 16, supra, and in the TOFC Rules, is one and the same with the "*traffic* of any other carrier of whatever description" as these words are used in the proviso to § 3(1). If motor carriers tender to railroads under the railroads' open tariffs, traffic which the motor carriers have accepted from shippers for carriage, the railroads are free, by force of the proviso to § 3(1), to reject that traffic without violating any provisions of the Act.

D. Carriers acting as carriers are not subject to Section 3(1).

The government states that "A refusal to perform the same service for a carrier *qua* shipper as for other shippers is both unjust discrimination and unreasonable prejudice." (Br., p. 34). The Commission on the contrary stated:

> "We can see no justification, either from the standpoint of legislative limitations or of policy considerations, for holding that one carrier may in no circumstances make use of the services which another carrier holds out to the public generally. So long as the first carrier is operating *qua* carrier and gives the public proper notice through its tariffs, it can substitute another's service for its own in this way. . . ." (322 I.C.C. at 335)

At no point does the Commission say that motor or water carrier may act qua shipper. It must at all times be a carrier for that is in fact what it is. Rule 3 specifically states that the motor or water carrier is to be performing its authorized service at the time it is using TOFC

service. Accordingly cases, such as those cited by the government are not controlling for they only deal with carriers acting as ordinary and bona fide shippers and not when acting in their capacity as carriers.

Section 3(1) was held to be inapplicable to relations between common carriers even before the addition of the proviso in 1940.[17] There are numerous decisions to the same effect after the addition of the proviso in 1940.[18]

These decisions apply not only to discrimination as to rates but in addition to discrimination as to the provision of services. Therefore the effort to assert that the plain language of the proviso can be rewritten so as to limit its application is directly contrary to the settled construction of the section.

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17. *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932). See also, *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Nicholson Universal S. S. Co.* v. *Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934); *Quanah, A & P. Ry. Co.* v. *A. T. & S. F. Ry. Co.*, 205 I.C.C. 253, 261 (1934); *Oregon Short-Line & U. N. Ry. Co.* v. *No. Pacific R. Co.*, 61 Fed. 158, 159-160 (9th Cir. 1894); *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557, 560 (1939).

18. For similar decisions after the addition of the proviso to section 3(1) in 1940, see *Chicago, Milwaukee St. P & P. R. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), aff'd, 182 F. Supp. 81 (E.D. Wis.), 366 U.S. 745; *Denver & Rio Grande Western R. R. Co.* v. *Union Pacific R. R. Co.*, 287 I.C.C. 611, 619 (1953), aff'd, 351 U.S. 321; *Atlantic Coast Line R. R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Consolidated Mining & S. Co. of Canada* v. *N. Y. Central R. R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Eastern Central Motor Carriers Assn.* v. *Baltimore & Ohio R. Co. et al.*, 314 I.C.C. 5, 50 (1961). Aff'd *sub nom. Cooper-Jarrett* v. *United States*, 226 F. Supp. 318 (W.D. Mo. 1964), aff'd 379 U.S. 6; *Sea Train Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 220 (1940); *Hoboken Mfrs. R. Co.* 248 I.C.C. 109, 119 (1941);

And for similar decisions under the discrimination and prejudice section of the Motor Carrier Act, see *Freight, All Kinds, Chicago & I.H.B. Ind., Mich., Ohio*, 322 I.C.C. 423, 427 (1964); *Proportional Rates Between Harrisburg, Pa., and Points in Penna.*, 315 I.C.C. 499, 503 (1962); *Commodities Between Illinois, Kansas and Missouri*, 31 M.C.C. 323, 325-326 (1941); *Fort Smith & Western Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 216 I.C.C. 411, 432 (1936).

E. Appellants have not cited a case holding that Sections 1(4), 2 or 3(1) require one carrier to perform service for another carrier acting in its capacity as a carrier as Rules 2 and 3 would require.

The court below, after having had most of this court's decisions referred to on brief here called to its attention, said (R. 39-40):

> "Although it is settled that a common carrier may not discriminate against (or in favor of) another carrier shipping its own property for its own purposes,[32] Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for another carrie [sic], *qua* carrier, as the Commission's new rules would command.
>
> "32. *I.C.C.* v. *Baltimore & Ohio R. R.*, 225 U.S. 326 (1912). Freight forwarders, not entitled to establish through routes and joint rates with common carriers under the Act, are in the same position as ordinary shippers and are thus protected from discrimination under the Act. *I.C.C.* v. *Delaware, L. & W.R.R.*, 220 U.S. 235 (1911)." (R. 39-40)

Appellants have submitted no decision of the Commission or the courts here that calls for an amendment of that statement.

In *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 Fed. 912, 915 (8th Cir. 1892), cert. den. 146 U.S. 354, the court said:

> "No power existed at common law, and none is given by the Act to court or Commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite on a joint tariff. *Express Cases*, 117 U.S. 1; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 559. The whole matter is left to the voluntary action of the companies. . . ."

At common law a common carrier could not be compelled to enter into arrangements with another common carrier for the handling of either passenger or freight traffic.[19] Since it is asserted that Section 1(4) merely codified the common-law duty to serve, (Govt p. 26) it is a duty qualified by the absence of any common law obligation to enter into arrangements with other carriers.

Appellants cite *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.* 220 U. S. 235 (1911) as a case most nearly in point (Govt p. 29). Freight forwarders have been given a unique status as a carrier whose defined services ". . . (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (49 USC § 1002(a)(5)). No other part of the Act contains a comparable provision. When Congress wanted to authorize a carrier's utilization of another carrier, it did so explicitly and may be presumed to have omitted the provision from other parts because it did not choose to create a comparable status for carriers operating under the other parts. The point is put beyond doubt by § 203(a)(13) which specifically excludes any vehicle or car operated exclusively on rails from the definition of equipment that a motor carrier may use in performing its authorized service. Forwarders are authorized by statute to use the services of railroads whereas motor carriers are precluded by statute from using the services of rail carriers. Since forwarders hold this unique status, it cannot be concluded that the language used in *Delaware* applies to carriers acting as carriers under the other parts of the Act.

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19. *Oregon Short Line Ry. Co.* v. *Northern Pacific R. Co.*, 51 Fed. 465, 472-473 (Oregon 1892), aff'd, 61 Fed. 158, 162 (9th Cir. 1894); *St. Louis Drayage Co.* v. *Louisville & Nashville R. Co.*, 65 Fed. 39, 41-42 (E.D. Mo. 1894).

One year later the *Delaware* case was cited in *I.C.C.* v. *Baltimore & O. R.R.*, 225 U.S. 326, 342 (1912), where this court said:

> "It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

A distinction was drawn between the relationship of a carrier to another carrier conducting operations as a carrier and the relationship of a carrier to another carrier acting as a patron in the movement of its own goods. The language in *Delaware* must be read in the light of the latter distinction.

A careful reading of *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 745-755 (1931), will show that the finding of discrimination applied only when the passenger cars were being moved solely for the benefit of the owning line, not when the cars were in revenue service, i.e. when being used by a carrier as a carrier. *Kansas City Sou. Ry.* v. *U.S.*, 282 U.S. 760 (1931), follows the same analysis.

Operations under Rules 2 and 3 would be entirely different from any case cited by appellants, in that the motor carrier is acting as a *carrier* in respect to the traffic in its possession and which it tenders to the railroad. Appellants' arguments are devoted to trying to bridge the wide gap between their authorities and that situation. They are trying to bridge the wide gap between their authorities and TOFC Rules 2, 3(a) and 3(e) which would empower motor carriers "in the performance of" . . . their *authorized service as carriers* to "tender *traffic* to" railroads for shipment under TOFC open tariffs.

Appellants cannot bridge that gap because it is already occupied by the wall of the proviso to § 3(1), which says

that § 3(1) "shall not be construed to apply to discrimination, prejudice, or disadvantage to the *traffic* of any other *carrier* of whatever description." (Emphasis supplied.) The direct authority that appellants could not find in decisional law is precisely supplied by the proviso, but the proviso is exactly opposite to the theory and conclusion which appellants hoped to reach.

VI

THE REVOLUTIONARY CHANGES WROUGHT BY RULES 2 AND 3 CANNOT BE LEGALLY SUPPORTED BY GENERAL REFERENCES TO ANY LANGUAGE IN THE NATIONAL TRANSPORTATION POLICY, THE PURPOSES AND POLICIES OF THE DISCRIMINATION PROVISIONS OR TO THE COMMISSION'S LIMITED AUTHORITY TO FILL IN THE INTERSTICES OF THE ACT.

With no direct authority holding that Section 2 requires one carrier to serve another carrier acting as a carrier, appellants seek to have comments made in cases dealing with ordinary bona fide shippers, and forwarders having the same legal rights as shippers, extended to apply to carriers acting as carriers. Recognizing that Section 2 standing alone affords inadequate authority for Rules 2 and 3, resort is had to Sections 1(4) and 3(1). The common law makes it plain that the construction sought to be placed on Section 1(4) is invalid and the proviso of Section 3(1) stands squarely in the way of its use to justify Rules 2 and 3. The road then leads to an argument that the Commission ought to have authority to work this revolution in transportation because of some general policies underlying the discrimination sections and the National Transportation Policy, even if the statutory provisions don't directly cover the situation.

Where Congress has dealt extensively throughout the Act with coordination of different modes of transportation, where the settled construction of the Act by both Commis-

sion and the Courts has carried into effect the plain meaning of the Act, and when Congress, with knowledge of the case law, has been given numerous opportunities to change the law and failed to do so, it is clear that a change in public policy on the matter must come from Congress and the Commission is not free to radically change the format established by Congress. *Maurer* v. *Hamilton* 309 U.S. 598 (1940).

A. Use of TOFC services by shippers and by carriers acting as carriers involves dissimilar circumstances and conditions.

The Court is urged to go beyond the terms of the statutes on the assertion that " . . . the discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act." (Govt p. 40). This is a factual assertion and yet no record support for it is cited and it is followed by a hypothetical discussion of a situation, apparently intended to suggest the need for Rules 2 and 3. Because the open tariff issue was effectively brought into the proceeding after the record was completed, such arguments as these must be resorted to in place of a solid analysis of actual shipper and carrier testimony. In this day and age, major structures or major policy changes are not made without the most careful and factual studies possible. No such study was placed in this record, because the issues as to Rules 2 and 3 were not dealt with until oral argument, at which time factual presentations were not in order.

The argument assumes that there is such comparability between ordinary shippers and motor carriers that failure to accord them identical treatment will result in ". . . many of the same injurious consequences . . ." for the motor

carrier as for the shipper. Apart from the public policy established by Congress to govern this situation and apart from the lack of any record support for the assumption as to identity of interests, it is readily apparent that there are some very significant factors that will influence motor carrier use of TOFC service that do not apply to the manufacturers constituting the shippers in the government's hypothetical example.

Highway carriers will use TOFC service only where it is to their advantage to do so. Their criteria for determining this advantage are not the same as for an ordinary shipper. The Government contends that the Commission's rules only permit the motor carriers to compete with railroad and shipper trucks in the truck segment of piggyback (Govt. 50). There is no record reference to support that statement. The Rules would permit the motor carriers to do much more.

Under Plans II, III and IV, a motor carrier could help solve some of its carrier problems by taking the following actions:

(a) Handle "balloon type" freight that is not attractive to the highway carrier in TOFC service under Rules 2 and 3.

(b) Where the motor carrier has temporary shortages of equipment or manpower, assign the problem of handling the excess to the railroads under Rules 2 and 3.

(c) Selectively assign equipment and drivers to handle traffic to regular customers offering desirable freight, thus virtually guaranteeing service to favored shippers.

(d) During periods of inclement weather, such as winter months in northern sections of the country, when highway routes are either hazardous or closed or expensive to

operate over, turn over significantly larger proportions of traffic and let the railroad solve the operating problems.

(e) Turn over to the railroads any overweight, overwidth or overheight movements requiring special height permits, escorts or restricted hours of travel, and thus relieve motor carriers of these added costs.

(f) Assign to the railroads shipments with excessive pickup or delivery costs, such as longer-than-average runs, runs in congested districts, shipments involving hand loading versus palletized loading.

(g) Use TOFC movements to offset any imbalance of operations. The motor carrier could use his equipment and drivers to achieve a completely balanced movement over the highway and send any unbalanced traffic via the railroads, thus adding generally to the imbalance in railroad equipment in both vans and flat cars. The empty return problem is one of the most important problems confronting a common carrier. As noted above, there is information that some motor carriers have been making use of piggyback primarily for empty return movements, (*supra,* p. 8).

It would appear that railroads had good reason to be somewhat cautious about entering into unlimited joint, coordinated service where the primary use of the existing coordinated service was to reposition empty motor carrier equipment. The course of mutually beneficial rail-motor cooperation would presumably require mutual efforts to meet the needs of the shipping public, taking into account both the loaded and empty movements, not an arrangement performed to solve motor-carrier operating problems. Contrary to the Commission's conclusion, blanket orders requiring the highest degree of coordination, but which are not mutually beneficial and produce one sided advantages, will not give the freest play to the inherent advantages of each

mode of transportation and encouragement of such indiscriminate coordination is not in the public interest. (322 I.C.C. at 330.)

(h) Tender very little traffic on weekdays, but very large proportions of the motor carrier's traffic on Fridays to escape penalty teamster wage costs and other weekend loading and unloading problems occasioned by the five-day business week.

Through direct contacts with shippers, railroads can undertake to maximize efficiency in the operation of TOFC services. Under Rules 2 and 3, motor carriers could in part tender traffic to the railroad in order to solve their own operating problems. Motor carriers are unlikely to keep railroads fully informed about their operating problems and thus hand their competitors an additional basis for solicitation of traffic.

There is no basis in this record for a finding that ordinary shippers and motor carriers have an identity of interest or that failure to treat them the same has the same consequences.

B. Since open tariff TOFC plans are available directly to shippers, Rules 2 and 3 cannot be justified on grounds of any savings in the nation's resources.

Rules 2 and 3 have not been justified as responsive to the demands of shippers. By hypothesis the TOFC service is already available to them directly without the intervention of the motor carrier under Rules 2 and 3. If the railroads are able to offer a lower cost or a better service via TOFC than the motor or water carriers, some traffic may well be diverted from their competitors, just as traffic has been diverted from the railroads to other modes when they could offer the shipper their advantages. Such consequences do

not provide any foundation for an argument in favor of Rules 2 and 3 on grounds of maximizing the efficient use of the nation's resources. But appellants say some shippers may remain loyal to the motor carrier. (Gov't p. 41). How many shippers would fail to follow their own economic best interests is not explained. Thus there is no basis for judging the substantiality of the argument. "Other factors [than costs] including service, play a large part in determining how trailers shall move." (Piggyback Traffic Characteristics (1966) p. 36.) The argument in effect is that the motor carrier should be protected against TOFC competition so that it can retain business it might otherwise lose and in order, apparently, that shippers choosing to route their traffic on grounds of loyalty to motor carriers rather than economics may continue to do so. There is no showing on the record that shippers will gain any benefit by reason of Rules 2 and 3 in terms of lower rates or better service than is already available to them under the open tariffs. A conclusion on the subject could only be made after making a study of rates and services available under present voluntary arrangements with rates and services that would be available under the compulsory arrangements of Rules 2 and 3. No such study was made.

Every TOFC rate and service is now directly available to the shippers. There is no issue as to efficient use of national transportation resources involved in this case. The issue is whether railroads will be permitted to compete for traffic. The short answer to the hypothetical example on pages 40-42 of the Government's brief is that bona fide shippers are protected by the anti-discrimination provisions of the Act against discrimination in rates or services.

C. Rules 2 and 3 are anti-competitive.

Rules 2 and 3 would virtually nullify the railroad's ability to offer a unique rate or service to a shipper and thus create

competition with other modes of transportation. Every reduced Plan II, II½, III or IV rate made for the specific purpose of competing with motor or water carriers would automatically become available to those very motor or water carrier competitors under Rules 2 and 3. To the extent these reduced rates were made possible by the inherent cost advantage enjoyed by the railroads, making these rates automatically available to rail competitors would deny the railroad the enjoyment of its inherent advantage. In *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83 (1957), this court stated:

> "The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the Congressional policy requires the Commission to recognize." (p. 91)
>
> ". . . a rate benefit attributable to differences between the two modes of transportation [rail and truck] is an 'inherent advantage' of the competing type of carrier and cannot be ignored by the Commission." (p. 92)

The I.C.C. Bureau of Economics states:

> "Piggyback rates may have important effects on the revenues of the modes publishing the rates, on the competitive position of other modes, on the structure of freight rates, and on shippers and commodity movements." (Piggyback Traffic Characteristics (1966) p. 10.)

Making Plan III and Plan IV TOFC all-freight rates available to motor carriers will disrupt the structure of rail rates in ways not available to ordinary shippers and forwarders. Higher rated traffic moving in either conventional rail or TOFC rail equipment can be solicited by motor carriers and then offered back to the railroads under

Rules 2 and 3 at lower all-freight rates. Implementation of Rules 2 and 3 will inhibit the growth of TOFC services. Rail traffic officers will be compelled to evaluate not only the costs and market potentional for each rate, based on facts relating to ordinary shippers, but in addition the added costs and disruption of the rate structure that may be anticipated when other modes use TOFC services under Rules 2 and 3.

D. No factual showing has been made that railroads dominate the highway portion of TOFC services.

Next it is asserted that "Railroad domination of piggyback may also fester monopoly conditions in the vital truck segment of piggyback service." (Govt. p. 43) There is, first of all, no record support for an assertion that railroads are monopolizing the truck segment of piggyback service. There is no traffic study to determine who has actually performed the highway portion of the TOFC service under the various plans. The availability of Plans I, II½, III, IV and V make it perfectly evident that railroads have not undertaken to monopolize the performance of the highway movement in connection with TOFC service.

Since motor carriers perform the highway service in Plans I and V and since the shipper can select any motor carrier he desires under Plans II½, III and IV any argument about monopilization must relate to Plan II. The latest data indicates Plan II service declined from 39 percent of terminations in 1964 to 38 percent of terminations in 1965. Plans II½, III and V have shown a greater rate of growth recently. (Piggyback Traffic Characteristics (1966) pp. 15, 18.) There simply is no factual foundation for the argument that railroads are monopolizing the highway portion of TOFC service.

E. Present coordination practices are in accordance with Congressionally approved policies.

1. PLANS I AND V.

Appellants complain that railroads may and do refuse to enter into through-route and joint-rate arrangements with motor carriers for TOFC Plans I and V. (Govt. pp. 11-12; ATA pp. 18, 20-21.) But that practice cannot be an infringement of the National Transportation Policy; ever since Part II was enacted in 1935 Congress has knowingly maintained a steadfast course in refusing to amend § 216(c) so as to make motor-rail through-routes and joint-rates compulsory. *It is the Congressional policy of which appellants complain.*

Where Congress has concluded that the Commission should have authority to order into effect coordination of services, it has so provided in § 15(3) at 216(a).

In explaining proposed § 216(c) in the Senate in April, 1935, Senator Wheeler said:

> "Paragraph (a), as amended by the committee, is confined to common carriers of passengers by motor vehicle. They are required to establish reasonable through routes with other such common carriers and to establish just and reasonable rates and equitable divisions thereof. In the original bill there was a provision for mandatory through routes and joint rates between all motor common carriers and carriers by rail, express, and water. There was substantially unanimous disapproval of this provision.
>
> "However, in my judgment, it should have been done; and I think the Congress should have been asked to do it, but many of the small operators were afraid that if this were done it would give preference to the railroads, and therefore they were afraid to ask it. Hence paragraphs (b) and (c) have been introduced by the

committee in order to make joint through routes and rates permissive between motor carriers of property and between motor carriers of passengers or property and other agencies of transportation. The Commission is, however, given authority to pass on the reasonableness of any joint rates so established and to adjust the divisions thereof." (79 Cong. Rec. 5655.)

Before the Senate Committee on Interstate Commerce, in April, 1939, in hearings on S. 2009, which became the Transportation Act of 1940, Commissioner Eastman said:

"When we first drew the Motor Carrier Act we had provisions for making it a duty to establish reasonable through routes and joint rates generally. . . ."

"In other words, it would be the duty of the railroads and the motor carriers to establish reasonable through routes and joint rates, and the Commission could require their establishment if that were not voluntarily done. In the hearings on that bill it developed that, so far as joint rates between railroads and motor carriers were concerned, the railroads did not want such a provision; the motor carriers did not want it; and the shippers did not want it. There were various differing reasons for these views by the different parties but nobody seemed to want it, and everybody seemed to be against it. So the bill was changed to the form of the present Motor Carrier Act; in other words, making reasonable through routes and joint rates between motor carriers of passengers compulsory, but through routes and joint rates between motor carriers of property voluntary; and also through routes and joint rates between either passenger or property motor carriers and railroads. Personally, I have always thought that the Commission ought to have the power to establish through routes and joint rates broadly. . . . However, in view of the reception which our recommendation to that effect got back in 1935, the Commission has been reluctant to bring forward any such suggestion unless there was evidence that

somebody really wanted it to be done." (Hearings before Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 2009, pp. 817-818.)

At various times the Commission has asked Congress to amend § 216(c) so as to empower the Commission to compel railroads and motor carriers of property to enter into through-routes and joint-rates, but Congress has failed to grant the power sought. See the Commission's 75th Annual Report to Congress, 1961, p. 186; 76th Annual Report, 1962, p. 201; 77th Annual Report, 1963, p. 19. Bills to effectuate these recommendations were introduced in Congress but were not enacted. These were S. 3510 and H. R. 12362, 87th Congress; and S. 676 and H. R. 2088, 88th Congress. See 1962 and 1963 Annual Reports, pages cited.

Appellants are predicating certain of their arguments upon a disagreement with Congressionally approved public policies. They are in the wrong forum in seeking to change those policies. *American Trucking Associations* v. *United States,* 364 U.S. 1, 5 (1960).

2. Plan II

Appellants point to the popularity of Plan II TOFC service and draw the conclusion that Plan II is a device that wrongfully excludes motor carriers from participation in TOFC operations (ATA Br. pp. 19-22-23). The Government puts it this way (Br. p. 12), in describing the effects of Plans II and III:

> "Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads."

Again it is *the policy of Congress* against which appellants complain, since Congress has intentionally made Plan

II a railroad service, "as opposed to a joint, coordinated service of the regulated motor carriers and the railroads." That highway-rail-highway movement is made possible by specific Congressional intent expressed in § 202(c) of the Interstate Commerce Act, 49 U.S.C. § 302(c). Section 202(c) exempts from regulation under Part II (which governs motor carriers) the railroad's "performance within terminal areas of transfer, collection, or delivery services," and makes such services subject to Part I (which regulates railroads). This Court held that § 202(c) is a manifestation of Congressional intent that the National Transportation Policy favors certain truck operations by railroads, including pick-up and delivery in terminal areas, in *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60 (1945).

3. Plans III and IV

Appellants complain that TOFC plans III and IV, particularly the former, have diverted large volumes of traffic from motor carriers (Govt. p. 12; ATA pp. 18-20). But here again, as we have pointed out before in respect to the other TOFC plans, it is the policy of Congress, manifested in the Interstate Commerce Act, that has made Plans III and IV possible.

If the shipper is a private carrier, it is exempt from economic regulation under Part II, since by definition it is neither a common nor contract motor carrier. Section 203(a)(17), 49 U.S.C. 303(a)(17). The policy of Congress favors maintenance of the right of a private carrier to transport his own goods in furtherance of his own "primary business enterprise." *Red Ball Motor Freight, Inc.* v. *Shannon,* 377 U. S. 311 (1964).

If the shipper engages a local cartage trucker to move the trailer from the shipper's loading dock to the sidetrack,

the movement by the local trucker is exempt from Part II regulation by force of § 203(b)(8). If the shipper is a freight forwarder subject to Part IV of the Interstate Commerce Act, his "transfer, collection, or delivery services" by motor vehicle within the terminal area are exempt from Part II and made subject to Part IV by § 202(c), just as the railroad terminal area services described above are exempt from Part II and made subject to Part I by § 202(c). Whether the highway portion of the haul is within an exempt terminal area or involves movements beyond the terminal area, motor carriers are of course in a position under the tariffs to compete for the highway haul.

F. Rules 2 and 3 are not justified by the National Transportation Policy.

Finally, it is asserted that Rules 2 and 3 are consistent with the objectives of the National Transportation Policy (Govt. pp. 46-52).

In no Part of the Interstate Commerce Act has Congress adopted a blanket policy in favor of coordination in all circumstances. The specific expression of congressional policy on rail-motor carrier coordination is that stated in section 216(c) which provides for voluntary coordination. The specific expression of congressional policy on rail-water coordination is that stated in section 15(3) which empowers the Commission "after a full hearing" to establish through routes and joint rates between rail and water carriers. In the debates concerning the necessity for the last sentence in the National Transportation Policy, it was stated that:

> "... [The policy] cannot supersede the specific proposals contained in the body of the bill." (84 Cong. Rec. 9685.)

This court has confirmed that the National Transportation Policy's language must be construed in relation to the provisions in the Interstate Commerce Act. *Interstate Com. Comm'n* v. *New York, N.H. & H. R.R.*, 372 U.S. 744, 762 (1963).

In contrast to *United States* v. *Pennsylvania Railroad Co.*, 323 U.S. 612 (1945), where the Court was implementing a specific set of statutory provisions calling for through routes and joint rates, the request here is to approve rules requiring coordination in a manner not provided for in the Act. In fact, the coordination would be in violation of specific sections of the Act, namely §§ 15(3), the certificate provisions of Part II, and § 216(c).

Apart from the violation of specific sections of the Act noted above, it is clear that the arguments are without equity and are not founded in fact.

1. Fair and impartial regulation of all modes of transportation requires that motor carriers not be allowed to follow the traffic back to railroads. The follow the traffic theory was not available to the railroads. What is proposed is not compulsory joint through rates in which motor carriers enjoy the benefits of their own operations but a direct invasion of rail services and facilities.

2. Motor carriers are now able to compete for the traffic they are best able to handle. They are able to handle the traffic over the highways and they are able to handle traffic in connection with TOFC service under Plans I, II½, III, IV and V and under II by arrangement with the railroad. Their inherent advantage does not embrace direct operation over a railroad. If they are given the privileges under Rules 2 and 3, motor and water carriers will have full access to the only inherent advantage the railroads

have. There is a direct inroad on the railroads' ability to make TOFC rates because, as every traffic officer knows, rates are made to reflect all the transportation characteristics of the traffic. These characteristics, empty return movement, etc. will not be the same for motor carrier traffic as they are for ordinary shipper traffic.

3. Since Plans II, II½, III and IV are now available directly to the shippers, Rules 2 and 3 do not promote adequate and economical service or sound economic conditions in transportation. The do enhance the competitive position and the financial fortunes of the long-haul motor carriers.

4. There is not a single rate increase cited as resulting from present TOFC arrangements. The argument that these arrangements may lead to higher rates is without support in fact.

VII

AS A RESULT OF INADEQUATE NOTICE, RULES 2 AND 3 ARE NOT SUPPORTED BY ADEQUATE EVIDENCE NOR FINDINGS OF FACT BASED ON SUCH EVIDENCE.

The proposed rules that were before the parties during all of the evidence-taking stage of this proceeding did not include TOFC Rules 2 and 3. The proposed rules did not include any issue or rule directed to the question of whether motor and water carriers could or should lawfully use TOFC Plans II, III, and IV open tariffs for the transportation of freight tendered to them by shippers. See part 7 of our Statement of the Case.

As a consequence the record as made before the Commission did not include evidence directed to the issues raised by Rules 2 and 3. Nevertheless, it is argued here, among other things, that Rules 2 and 3 will conserve national transportation resources, that railroads are domi-

nating the highway portion of TOFC operations, that the consequences of differing treatment of connecting motor carriers is the same as discrimination as between shippers, and that the balance of competition between railroads and motor carriers needs altering. (Govt. 19, 22, 40, 42, 43.) Each of these factual allegations could have been dealt with at the fact finding stage of the case. They are presented here on the basis of broad assertions, extra-record references, and the most minimal reference to the record.

Rules 2 and 3 and the new principle upon which they are based, i.e., that any carrier may use the open tariffs of any other carrier, is unquestionably one of the most revolutionary issues to ever come before the Commission. It must be presumed that, given proper notice, the shippers, motor carriers, water carriers and railroads would have presented evidence with respect to these rules and the underlying principle.

Because the notice was inadequate, adequate evidence to support Rules 2 and 3 was not presented and findings thereon could not be made. The Proposed Report of the Examiners dealt with the case on the basis on which it was tried.

In setting aside an order of the Commission in which a large amount of evidence bearing upon the pattern of motor-rail competition had been systematically excluded, this Court said:

> "Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information." *American Trucking Associations, Inc.* v. *United States,* 326 U.S. 77, 86 (1945).

Here the railroads were deprived of the opportunity "to fully develop the bearing" of Rules 2 and 3 upon themselves, and the Commission exercised its discretion without the consideration of necessary information directed to the effect of the open-tariff rule upon the railroads. The order here is just as defective as the order in *American Trucking Associations*, supra.

A document was distributed by the Commission at the prehearing conference advising the parties that the proposed rules did not contemplate the use of TOFC service by motor contract carriers (R. 130). Nevertheless, Rule 3 authorizes such carriers to use rail TOFC open tariffs. And as Commissioner Webb pointed out, the parties were never advised that open tariff TOFC service involving Plan II was contemplated (322 I.C.C. at 395).

VIII

THE FREIGHT FORWARDERS' ARGUMENT

The freight forwarders are presenting argument as to reasons why Rules 2 and 3 violate statutory provisions of direct interest to them. A motor or water carrier remains at all times a carrier and must operate in accordance with its authorized service. If a carrier tries to assume the additional mantle of a shipper under Rules 2 and 3, it runs squarely into the violation of Section 410(c) of the Act, 49 U.S.C. § 1010(c), as pointed out by the forwarders. No extended comment need be made about footnote 40 on page 63 of the Government's brief concerning the invalidity of certain TOFC arrangements since it obviously does not take account of specifically authorized joint arrangements permitted carriers under §§ 15(3) and 216(c).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

(322 I.C.C. 413)

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

APPENDIX B

THE INTERSTATE COMMERCE ACT

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

DUTY TO FURNISH TRANSPORTATION AND ESTABLISH THROUGH ROUTES; DIVISION OF JOINT RATES.

SEC. 1(4). [*49 U. S. C. § 1(4).*] It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and

classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SPECIAL RATES AND REBATES PROHIBITED

SEC. 2. [*49 U. S. C., § 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

PREFERENCES; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

SEC. 3. [*49 U. S. C. § 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this part to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

ESTABLISHMENT OF THROUGH ROUTES, JOINT CLASSIFICATIONS, JOINT RATES, FARES, ETC.

SEC. 15(3) [*49 U.S.C. § 15(3)*] The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare,

charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

APPLICATIONS OF PROVISIONS

SEC. 202. [*49 U.S.C. § 302.*] (c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery

service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

DEFINITIONS

SEC. 203. [*49 U.S.C. § 303.*] (a) As used in this part—

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*49 U.S.C. § 306.*] (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by a motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its opera-

tion and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. [*49 U.S.C. § 308.*] (a) Any certificate issued under section 206 or 207 shall specify the service to

be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

SEC. 209. [*49 U. S. C. § 309.*] (a) (1) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive juris-

diction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed

to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216(c). [*49 U.S.C. § 316(c)*] Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular

person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

DEFINITIONS

SEC. 302(d). [*49 U.S.C. § 902(d).*] (d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract ca-

rier by water". Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND PERMITS

SEC. 309. [*49 U. S. C. § 909.*] (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such

operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

(f) Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission

shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application.

APPENDIX C

CASES DENYING OR PARTIALLY DENYING AUTHORITY WHERE THE COMMISSION RELIED ON THE ACME PRINCIPLE

Providence—Philadelphia Despatch Common Carrier, Application, 11 M.C.C. 173 (1939)

Consolidated Shippers, Inc., Common Carrier Application 11 M.C.C. 428 (1939)

Hugh F. Gannon, Inc., Common Carrier Application, 11 M.C.C. 439 (1939)

Salt Lake Transfer Co., Common Carrier Application, 12 M.C.C. 43 (1939)

Tierney Broker Application, 12 M.C.C. 88 (1938)

Bellamy Broker Application, 14 M.C.C. 297 (1939)

Corpus Christi Distributing Service, Inc., Common Carrier Application, 17 M.C.C. 538 (1939)

Lone Star Package Car Company, Inc., Common Carrier Application, 19 M.C.C. 603 (1939)

Flynn Forwarding Co., Inc., Common Carrier Application, 19 M.C.C. 614 (1939)

Texas Package Car Company, Inc., Common Carrier Application, 19 M.C.C. 620 (1939)

Gulf Carloading Company of Texas, Inc., Common Carrier Application, 19 M.C.C. 623 (1939)

Springmeier Shipping Company, Common Carrier Application, 19 M.C.C. 627 (1939)

Rogers Package Car Company, Broker Application, 20 M.C.C. 619 (1939)

Highway Express & Forwarding Co., Common Carrier Application, 21 M.C.C. 116 (1938)

Highway Lake Freight Company, Common Carrier Application, 21 M.C.C. 113 (1939)

Merchants Shippers Association, Inc., Common Carrier Application, 21 M.C.C. 197 (1939)

National Carloading Corp., Common Carrier Application, 21 M.C.C. 309 (1940)

Central States Frt. Serv., Inc., Broker Application, 21 M.C.C. 285 (1940)

Liberty Forwarding & Distributing Corp., Common Carrier Application, 21 M.C.C. 495 (1940)

Interstate Truck Service, Inc., Common Carrier Application, 21 M.C.C 645 (1940)

Black Hills Transportation Company, Broker Application, 22 M.C.C. 25 (1940)

Chain Deliveries Express, Inc., Broker Application, 22 M.C.C. 223 (1940)

Universal Carloading & Distributing Co. of Del., Common Carrier Application, 22 M.C.C. 491 (1940)

Merchants Carloading Co., Inc., Broker Application, 22 M.C.C. 496 (1940)

International Forwarding Co., Common Carrier Application 22 M.C.C. 581 (1940)

O'Malley Common Carrier Application, 23 M.C.C. 276 (1940)

N. E. Rosenblum Truck Lines, Inc., Contract Carrier Application, 24 M.C.C. 121 (1940)

Campbell Broker Application, 24 M.C.C. 281 (1940)

Northwestern Dairy Forwarding Co., Broker Application, 24 M.C.C. 323 (1940)

K.F.L., Inc., Common Carrier Application, 26 M.C.C. 83 (1940)

California Motor Express, Ltd., Common Carrier Application, 26 M.C.C. 429 (1940)

Coastwise Express Co., Inc., Common Carrier Application, 26 M.C.C. 702 (1940)

Elmira Transportation Lines, Inc., Common Carrier Application, 27 M.C.C. 356 (1941)

Wodlinger, Common Carrier Application, 28 M.C.C. 611 (1941)

H. S. Dorf & Co., Inc., Broker Application, 30 M.C.C. 626 (1941)

Clingerman, Extension of Operations, 31 M.C.C. 143 (1941)

Boston & Maine Transportation Co., Common Carrier Application, 30 M.C.C. 697 (1941), 34 M.C.C. 599 (1942)

Signal Cartage Service, Inc., Common Carrier Application, 33 M.C.C. 140 (1942)

Strickroot, Common Carrier Application, 250 I.C.C. 211 (1942)

D. S. Woodberry Co., Broker Application, 33 M.C.C. 199 (1942)

Intercity Transport Lines, Inc., Common Carrier Application, 44 M.C.C. 779 (1945)

Allied Van Lines, Inc., Common Carrier Application, 46 M.C.C. 159 (1946)

APPENDIX D

CASES IN WHICH THE COMMISSION HAS RELIED UPON SUBSTITUTED FREIGHT SERVICE IN DENYING APPLICATIONS FOR AUTHORITY OR DETERMINING THE LEGALITY OF RATES OR OPERATIONS.

Railway Express Agency, Inc., Determination of Status, 21 M.C.C. 161, 186 (1939)

Boston & Maine Transportation Co. Extension—Whitefield-Groveton, N.H., 22 M.C.C. 227, 231 (1940)

Greer Broker Application, 23 M.C.C. 417, 420 (1940)

Consolidated Freight Lines, Inc., Common Carrier Application, 27 M.C.C. 697, 706 (1941)

Motor Rail Co. Common Carrier Application, 31 M.C.C. 353, 357 (1941)

Railway Express Agency, Inc., Extension—Clarksburg, 31 M.C.C. 689, 703 (1942)

Classes and Commodities From Omaha to South Dakota, 32 M.C.C. 735, 737 (1942)

Stone's Express, Inc., Common Carrier Application, 32 M.C.C. 525, 527 (1942)

F. Landon Co. Common Carrier Application, 33 M.C.C. 165, 169 (1942)

Crooks Terminal Warehouse, Inc., Contract Carrier Application, 34 M.C.C. 679, 686 (1942)

Scott Bros., Inc.—Control—W. G. Corporation, 37 M.C.C. 225, 228 (1941)

Modern Transfer Co., Inc. — Purchase — Lehigh Valley Transportation Co., 39 M.C.C. 75, 82 (1943)

Ringsby Truck Lines, Inc. v. Atchison, T. & S. F. Ry. Co., 263 I.C.C. 139 (1945)

Texas and Pacific Motor Transport Co., Common Carrier Application, 41 M.C.C. 721 (1943)

Motor Haulage Co., Inc., Contract Carrier Application, 46 M.C.C. 107, 116 (1946)

Bekins Broker Application, 47 M.C.C. 183, 189 (1947)

Savage Application, 265 I.C.C. 157 (1947)

Southern California Freight Forwarders, Freight Forwarder Application, 265 I.C.C. 473, 476 (1948)

Peninsula Truck Lines, Inc., v. Puget Sound Navigation Co., 292 I.C.C. 157, 164 (1954)

Movement Of Highway Trailers By Rail, 293 I.C.C. 93 (1954)

Truck Trailers On Flatcars, Utah, Idaho, Oregon & Washington, 297 I.C.C. 395, 397 (1955), 298 I.C.C. 533, 534 (1956)

Pacific Motor Trucking Co., Extension—Oregon, 77 M.C.C. 605, 622 (1958)

Great Northern Ry. Co., — Control — Superior & Duluth Transfer Co., 85 M.C.C. 401, 406 (1960)

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